# *The* ANTITRUST BULLETIN

## *In This Issue*

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# The ANTITRUST BULLETIN

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**Symposium**

# ANTITRUST COUNSELING WITH EMPHASIS ON ROBINSON-PATMAN SITUATIONS

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# FEDERAL TRADE COMMISSION AIDS TO ANTITRUST COUNSELING

by

ROBERT M. PARRISH*

I understand the subject assigned to me to include generally the various areas in which our agency promotes law observance through furnishing guidance of one sort or another as to what legal requirements in our area may be. In some instances, this involves dealing with members of the bar. In other instances, we may be communicating with the business world directly. In either event, I look upon the antitrust bar probably as our strongest ally in promoting compliance through voluntary means.

The views which I will express here are of course not necessarily those of the Federal Trade Commission. I trust that, even after the questioning period which I understand will follow, they will continue to be mine.

As I am sure most of you know, the Federal Trade Commission during recent years has been constantly stepping up the tempo of its formal enforcement efforts. Last fiscal year, this reached the total of 503 complaints, the highest in the history of the agency. This total equalled the five-year output of the Commission for the years 1948-1952, which were not so long ago. On facts like these standing alone, one might leap to the conclusion that the agency was concentrating its entire resources in a formal enforcement program to the exclusion of voluntary compliance efforts. Actually, this is anything but true. Similar progress has been made in the field of voluntary compliance.

Basically, of course, the Commission's job is to obtain compliance with the laws it administers. Formal proceedings are one important tool to accomplish this but they are *a* tool, not *the* tool. The Commission is not a mere suing machine.

Today I shall devote most of my time to one phase of the Commission's voluntary compliance program in the antitrust field, the

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recently issued 2(d) and 2(e) Guides. But the Commission's numerous other programs of this type should also be noted. They are of various sorts, and include activities at the agency's topmost level. All have the common goal of obtaining compliance with the laws the Commission administers, by enabling those subject to the laws better to know what is required of them. Some of our voluntary activities besides the recent guides are the following:

1. I am sure that never before in the history of the agency has it had so vigorous a program for educating industry about the requirements of the laws it administers. This program is conducted at various levels, ranging from the Chairman himself, probably its most vigorous and active participant, through all levels of the agency, including the field offices. This general educational program is reflected in numerous speeches to various industry groups, and very frequent conferences with them, all looking toward promoting understanding of the laws we administer, and compliance with them. The Bureau of Consultation plays a particularly active role in this program.

2. The General Counsel's office offers counseling service in the antitrust field, especially of two types:

(a) This office gives legal advice in response to letters and other inquiries received. Such opinions are of course the General Counsel's views; they do not bind the Commission in a formal proceeding.

(b) This office also gives advice as to what is necessary to comply with cease and desist orders. Advice of this nature is given not only in connection with compliance reports under orders already issued, but also as to the compliance requirements of possible consent orders under consideration. In at least one series of cases, involving the so-called "chain lightning" broadcast merchandising plans, permission was granted to networks to operate the plans on a trial basis for a limited period subject to further examination to determine if their operation permitted proportional participation by competing customers. These plans represented substantial variations of plans previously ordered stopped after formal proceedings.

3. The Bureau of Consultation, in addition to the educational activities referred to above, conducts three other programs of significance in this area:

(a) This Bureau interprets the Section 2(d) and (e) guides.

(b) The trade practice conference program looks toward the issuance of trade practice rules for an industry, which frequently contain detailed provisions as to antitrust requirements.

(c) The Small Business Division advises small businessmen as to antitrust requirements generally and as to particular antitrust problems facing them.

4. The Bureau of Investigation considers requests received for advice as to the legality of proposed acquisitions, in the light of the requirements of Section 7 of the Clayton Act. It submits its recommendations to the Commission, and those inquiring are thereafter informed whether further action by the Commission would be contemplated should the acquisition take place.

About a year ago, I was named by Chairman Kintner and his colleagues to be Chairman of a task force to improve administration of the Robinson-Patman Act. Some of the Commission's most outstanding staff members were made available to me for this work. We came up with two recommendations which the Commission adopted:

1. To utilize authority contained in Section 6 of the Federal Trade Commission Act to require special reports from corporations in investigating Robinson-Patman cases. This suggestion has been put to use. It has successfully permitted simultaneous investigation of practices on an industry-wide basis to an extent never before possible. It is at least a step toward solving the problem presented in the *Moog* and *Niehoff* cases. *Moog Industries, Inc.* v. *F. T. C.* and *F. T. C.* v. *C. E. Niehoff and Company* (1958), 355 U. S. 411. This suggestion related primarily, of course, to the handling of investigations looking toward formal proceedings.

2. However, we also made what I consider at least an equally important recommendation having to do with the field of voluntary compliance. This was to issue guides, outlining in simple, non-technical language, to explain to industry generally, the requirements of Sec-

tions 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act. The Commission issued these guides last May. Since then, we have filled requests for more than 82,000 copies. This figure is of course in addition to the considerable reproduction and distribution of the guides by a number of trade associations and also their printing verbatim in many trade publications of wide circulation. I feel the guides are a very significant step in the antitrust field for at least two reasons:

(a) They demonstrate a recognition of the Commission's ultimate objective which is to obtain compliance with the law. They illustrate the advantage of having an administrative agency in the antitrust field since it can combine the use of both compulsory and voluntary means to obtain compliance.

(b) The fact that they cut across industry lines is a most important step to make the business community aware of the law's requirements. Any trade practice rules for a particular industry, while they certainly help to advise members of that industry about the law, must of necessity have very limited effect upon industry generally. Similarly, while an individual case involving a member of one industry may become well known to his competitors through the industry press and by word of mouth, we as lawyers know it can represent a precedent most vital to members of countless other industries as well. The guides seek to bring to the attention of all industry certain basic Robinson-Patman Act requirements, regardless of the particular industry in which the problems involved may have actually arisen.

Let me explain that the guides are not meant to be a technical restatement of the law. Nor are they intended as a substitute for legal advice. If anything, they should have the opposite effect of acquainting businessmen with the existence of legal problems, and the consequent need for counsel.

Since the guides were issued, we have received surprisingly few criticisms as to their wording or questions as to their correctness. Some points that have been raised are these:

1. "Customer" as used in Section 2(d) and "purchaser" as used in Section 2(e) are treated synonymously in the guides. More broadly, I might say that the guides treat as similar and corresponding the

provisions of Sections 2(d) and 2(e), notwithstanding that there are certain differences in wording between the two.*

A question has been raised as to whether, by equating the terms "customer" and "purchaser" in these two sections, the meaning of the latter term has not been unduly limited. Of course, in one sense, "purchaser" can be argued to be a broader term, since a person can be a purchaser of X Company's product without being a customer of X Company. But any such distinction would seem to disregard legal precedent. For instance, in *Kraft-Phenix Cheese Company*, D. 2935 (1937), 25 F. T. C. 537, the Commission held certain retailers to be indirect purchasers even though they did not buy directly from respondent because of certain relationships respondent had with them. However, if the broad definition of "purchaser" described above were applied, the whole doctrine of indirect purchaser would of course become unnecessary.

2. *Buyer's Liability.* At the time the guides were issued, no decision had been issued by the Commission on the question of whether a buyer who induces or receives an allowance he knows or should know is improper under Section 2(d) thereby violates Section 5 of the Federal Trade Commission Act. However, several Commission complaints had been issued including such a charge. The inclusion of Guide 15 indicating such possibility of liability has been criticized, although the guide was so worded as merely to indicate that the buyer "may be proceeded against." I feel that the inclusion of the provision was completely warranted, since the purpose of the guides is to advise businessmen how to avoid legal troubles. Certainly you, as careful counsel, would advise a client that a practice had become the subject of Government proceedings, albeit the point had not been completely litigated. In any event, the question has now been decided, at least at the Commission level. *In the Grand Union Company* case, D. 6973, the Commission held last August 12 in an opinion by Commissioner

* The guides do distinguish between the sections as to the applicability of the Section 2(b) defense. *Cf. F. T. C.* v. *Simplicity Pattern Company, Inc.*, (1959) 360 U. S. 55, indicating that the 2(b) defense applies in a 2(e) case and *In the matter of Henry Rosenfeld, Inc., et al.*, D. 6212, (1954) 52 F. T. C. 1535, holding the defense not to apply in a 2(d) case. The distinction which the Commission made between Section 2(d) and (e) in the Rosenfeld case as to applying the 2(b) defense is based on the wording of Section 2(b) rather than a difference in wording between Sections 2(d) and (e).

Secrest with Commissioner Tait dissenting, that the buyer could be liable in this situation.

In this area of the law, you may be interested in the complaint in the *R. H. Macy & Company, Inc.* case, D. 7869, issued last April 19, and now pending in litigation. This complaint alleges the inducement of $1,000 payments from suppliers in connection with respondent's year-long 100th anniversary celebration. In this complaint, the allegations stress the leverage of respondent's purchasing power, as contrasted with other cases such as *Grand Union* involving the charge of inducing allowances to promote the resale of the product, where the allowances had not been made available to others on proportionally equal terms.

3. *Indirect Customers.* Guide 3 defines the terms "customer" and "purchaser" so as to recognize the possibility the indirect customer or purchaser concept may apply in some circumstances. The law is far from settled in this area, and the guides make no attempt to spell out in detail the tests of where the doctrine applies. Compare the *Kraft-Phenix* case mentioned above, recognizing the doctrine, with *Klein* v. *Lionel Corp.* (C. A. 3, 1956), 237 F. 2d 13, where the court rejected it. All I can offer is the observation that it is at least easier to apply the doctrine in a 2(d) or 2(e) case, where the problem is that of furnishing the indirect customer proportional payments or services than it is in a 2(a) case, where you have to find not merely the relationship but that a discriminatory price was charged in a transaction that never actually occurred.

4. *Like Grade and Quality.* A question has been raised why the guides do not include the rule of the *Atalanta* case (C. A. 2, 1958), 258 F. 2d 365, that the requirements of Section 2(d) do not apply where the goods are not of like grade and quality. The trouble is, however, that this is but one variation of the basic rule, which is that the Sections apply as between competing customers buying goods of like grade and quality even though the goods are not identical. *General Foods Corp.*, D. 6018 (1956), 52 F. T. C. 798; *Golf Ball Mfrs. Assn.*, D. 3161 (1936), 26 F. T. C. 824; cf. *Bruces Juices, Inc.* v. *American Can Co.* (D. C. S. D. Fla., 1949), 87 F. Supp. 985, a section 2(a) case. The *Atalanta* case merely illustrates that if there are sufficient differences between the goods, they are not of like grade

and quality and further that like grade and quality is the test, not interchangeability.

Applying the test of like grade and quality can get you into at least one situation where I for one don't know the answer, the last of the four situations I will give:

(1) Where two customers both sell the manufacturer's own brand, they are both helping to promote both his product and his brand name, so that no problem exists; the law clearly applies. Here the two customers are on equal footing.

(2) Where two customers both sell goods of like grade and quality with their own private labels, so that both are promoting the product and neither is promoting the manufacturer's brand name, the law should quite clearly apply. Here too, both customers are in the same situation.

(3) Where the manufacturer pays a customer for using the customer's trade name on the goods to promote sale of the goods, the manufacturer must also make allowances available to competing customers distributing the manufacturer's own brand. This was decided in the *Golf Ball* case mentioned above. There those denied the allowances would seem to have been doing everything for the manufacturer that those granting it were, since they were promoting not only his product but his brand name as well.

(4) A troublesome situation arises where a manufacturer grants advertising allowances to promote his own brand. Must he then pay or make available an allowance on proportionally equal terms to a customer buying goods of like grade and quality which is sold under the customer's private brand? Here, those customers promoting the manufacturer's own brand would appear to be performing for him a greater service, since they are promoting the sale both of his goods and his brand. On the other hand, the private brand customer may very well be purchasing under a short-term contract and it is certainly not impossible that an advertising allowance paid to build up the customer's private brand name can ultimately result in promoting the sale of goods of the supplier's competitor, since the customer can of course shift suppliers of his brand upon termination of the contract.

In this situation, will the result be that the difference between manufacturer's brand and private brand will be disregarded, and the test of like grade and quality here applied as in other situations? It is quite arguable that this has already been decided by the *Golf Ball* case, since if a private brand is like grade and quality to a manufacturer's brand, the opposite would also logically be true. On the other hand, certain practical considerations could be argued to warrant a contrary result. If a distinction should be drawn, would it be on the basis of an exception to the test of like grade and quality, or instead on the basis that while the test remains the same a greater service is being performed in the case of the manufacturer's own brand and that he may properly confine his promotional program to those affording the greater service?

5. *The Recent* Yakima *Case*. In the recent *Yakima Fruit and Cold Storage Company* case, D. 7718, issued last October 10, the Commission held that the mere showing of payments to a customer in response to a solicitation to "participate" in an anniversary sale was not a sufficient showing to establish a supplier's liability under Section 2(d). The Commission's decision was unanimous, the opinion being by Commissioner Tait, with Commissioners Kern and Anderson concurring in the result.

In its opinion, the Commission stressed that under 2(d) there must be a showing that a payment is made as consideration for services or facilities furnished by the customer in connection with the seller's product and concluded that this had not been proved. The facts in the case were somewhat unusual, in that the respondent, whose total sales approximated $3,000,000 per year, did no advertising, cooperative or otherwise, but relied completely on the efforts of the Washington State Apple Advertising Commission for this purpose. The two payments to the buyer, totalling less than $300, were the only payments made by respondent to that buyer or any other customer during a five-year period.

While the services and facilities dealt with in Sections 2(d) and (e) are sometimes referred to as promotional services and facilities, this does not mean that they need be directly and closely related to the resale of the goods by the customer for the law to apply. Both Sections use the terms "in connection with the processing, handling,

selling, or offering for sale." While the court in the *Skinner* case (C. A. 5, 1956), 233 F. 2d 762, held that the services in question must be "merchandising services," other cases would appear to indicate that if "merchandising services" is the test, the term is to be broadly construed to include services which are not immediately connected with the customer's resale of the merchandise. The cases I have in mind are *Simplicity Pattern Company* v. *F. T. C.* (1959), 360 U. S. 55, where some customers were permitted to receive goods on consignment but others were not, *Appleton-Century-Crofts, Inc.*, D. 5773 (1951), 47 F. T. C. 1371 and *American Greetings Corp.*, D. 5982 (1952), 49 F. T. C. 440, where some customers but not all were allowed to return merchandise for credit, and *Life Savers Corp.*, D. 4571 (1941), 34 F. T. C. 472, where payments were made for the service of receiving at a central warehouse and distributing to various retail outlets.

The *Skinner* case also states that the service or facility must relate to a specific commodity. However, the *Woman's Day* case, *State Wholesale Grocers* v. *Great A. & P. Tea Company* (C. A. 7, 1958), 258 F. 2d 831, would indicate it is sufficient if the customer advertises the supplier's product generally, and not merely as being for sale in his store. The *U. S. Rubber Company* case, D. 3685 (1939), 28 F. T. C. 1489, at least as I read it, applied Section 2(d) to a situation where the payee of the promotional allowance never did take title to or resell the particular tires as to which the allowance was paid, though it did purchase and resell similar tires.

The *Yakima* case gets into an area where the connection is more remote, since the Commission concluded that the two payments in question were made without being in consideration for any service whatsoever, and hence not under Section 2(d). The case would appear to be much like the situation dealt with in Guide 11, which indicates that payments by a seller where the customer performs no services may result in legal action against the seller under Section 2(a). In *Miami Wholesale Drug Corp.*, D. 3377 (1939), 28 F. T. C. 485 and *Atlantic City Wholesale Drug Company,* D. 4957 (1944), 38 F. T. C. 631, wholesalers who induced suppliers to give discounts for ads in magazines they published, where the ads were of no substantial benefit to the advertisers, were held to violate Section 2(f). Presumably, if 2(f) is violated, a corresponding liability on the supplier's

part exists under 2(a). Of course, effect on competition would have to be shown.

It is interesting to compare the *Yakima* case with the *Macy* complaint in that in the latter case the respondent is charged with Section 5 violation even though it is not alleged that the sums received related in any way to specific goods or to their resale. Rather, violation is alleged to have resulted through the purchaser's improper use of leverage as a powerful buyer.

Both the pending *Macy* case and the *Yakima* case involve situations where payments were made in connection with a general institutional promotion of the buyer. Presumably, such a promotion would promote sales of the buyer's merchandise generally, including that supplied by the seller. In both the *Woman's Day* case and the *Golf Ball* case, the decisions indicate the payments received by the buyer did result in general institutional promotion of the buyer. However, in both these cases, there was also a direct connection to promotion of the seller's merchandise. The *Yakima* case might be construed to indicate that any incidental increase in the resale of the seller's goods arising from general institutional promotion of the buyer's business is an insufficient basis standing alone to bring a case within Section 2(d). Or looking at the case from another standpoint, it is a decision to be considered in determining which payments by sellers to buyers come within Section 2(a), and which are covered by Section 2(d).

# AN APPROPRIATE ROLE UNDER OUR FEDERAL SYSTEM FOR A STATE ANTITRUST ENFORCEMENT PROGRAM

by

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Treating this topic, my plan is, *first,* to touch briefly on the historic underpinnings for state antitrust authority as well as some general guides for division of responsibility between State and Federal antitrust programs. *Second,* building more specifically on the Federal experience involving identical bids, I take the liberty of suggesting, for possible state consideration, a comparable system for reporting by state purchasing officials to state attorneys general of suspect bids to state agencies. My purpose here is to suggest possible aids to state proceedings (under State or Federal antitrust laws) to collect damages due states from any rigged bids. *Finally,* in areas where the Federal, rather than the State, government has moved against an antitrust violation that has primarily damaged either city or state purchasing operations, how should the Federal Government appropriately aid state attorneys general to secure recompense for injured states or subdivisions?

## I. *The States' Role*

State and Federal antitrust laws are akin in origin. The events and influences that shaped the course of public opinion, some conspicuous and some obscure, operated through the legislative bodies of State and Nation at the same time. The Sherman Antitrust Act of 1890, 15 U. S. C. 1 *et seq.,* was neither the first nor the last of a series of enactments of the same general character. A dozen States had already established constitutional declarations or statutes to the

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ED. NOTE: This paper was delivered before a meeting of the Massachusetts Consumer Council, sponsored by the Council plus the Boston Bar Association held in Boston, Massachusetts, October 6, 1960.

same end. Two-thirds of the States had fallen in line by 1898.[1] And today almost every state of the union has such a law.[2]

With expanding Constitutional concepts of interstate commerce, the area within which the Federal antitrust laws operate has correspondingly grown. But this fact does not diminish the importance of state antitrust activities.

True, enacting the Sherman Law, Congress meant "to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements."[3] Congress in "preventing restraints on commercial competition . . . exercised 'all the power it possessed.'"[4] And this commerce power does not depend on "any particular volume of commerce affected more than that to which courts would apply the maxim *de minimis*."[5] In sum, "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze":[6] the Sherman Act still applies.

Equally true, however, there are important areas where, because of the purely intrastate nature of the practice, or the failure of Congress

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1 State Antitrust Laws xlvii (WPA ed. 1940).

2 See maps appended *infra*.

3 *United States* v. *South-Eastern Underwriters Ass'n*, 322 U. S. 533, 558 (1944).

4 *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 495 (1940). A few examples show the thrust of this power: Agreement among sugar refiners wholly within California to pay uniform prices to California beet growers held to affect interstate commerce, because, after refinement the sugar went into interstate commerce. *Mandeville Farms* v. *Am. Crystal Sugar Co.*, 334 U. S. 219 (1948). Price fixing in retail liquor sales in Colorado held illegal, the liquor having been shipped there from other states. The Court noted that although the defendants argued that "the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices," that in itself was no defense, for ". . . retail outlets have ordinarily been the object of illegal price maintenance." *U. S.* v. *Frankfort Distilleries*, 324 U. S. 293, 298 (1945). The Court has rejected argument that "the Sherman Act could not possibly apply [to plaster contracting in Chicago] because the interstate buying, selling and movement of plastering materials had ended before the local restraints became effective." *U. S.* v. *Employing Plasterer's Ass'n*, 347 U. S. 186, 189 (1954). Recent decision has condemned intrastate price discrimination by an interstate commercial baker against an intrastate competitor, noting that "Congress, as guardian of the Commerce Clause, certainly has power to say that those advantages shall not attach to the privilege of doing an interstate business." *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, 119-120 (1954).

5 *N.L.R.B.* v. *Fainblatt*, 306 U. S. 601, 607 (1939).

6 *United States* v. *Women's Sportswear Mfg. Ass'n*, 336 U. S. 460, 464 (1949).

to extend a particular facet of federal antitrust to the Constitutional limit,[7] state antitrust enforcement may be the only available remedy. In other areas where jurisdiction is concurrent, it may be the states that are better equipped to treat restraints, which though affecting or in commerce, are primarily of local impact: The Department of Justice necessarily must give priority in assigning its limited manpower to practices affecting multi-state markets. And in situations where the Department does bring an action, adequate local relief can sometimes only be secured by state authorities under their own laws. Such state enforcement action may be needed either fully to correct local aspects of a more widespread combination, or to enable states as parties under the Federal antitrust laws, to collect damages arising out of injuries to themselves or their subdivisions.

The law is clear that State antitrust laws may apply even though the same practice is or might be subject to Federal antitrust.[8] Unlike the situation sometimes presented by coextensive State and Federal law, where the former must sometimes give way even in the absence

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[7] See, *e.g.*, *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349 (1941) (Federal Trade Commission Act prohibitions on unfair competition and unfair and deceptive practices "in commerce" [15 U. S. C. §45(a)] does not extend to practices affecting commerce).

[8] See *e.g.*, *Leader Theatre Corp.* v. *Randforce*, 186 Misc. 280, 58 N. Y. S. 2d. 304 (1945); *aff'd*, 372 App. Div. 844, 76 N. Y. S. 2d 846 (1st Dep't, 1948). Involved there was a movie exhibitor-distributor conspiracy against plaintiff movie exhibitor. The court held that although there was sufficient interstate commerce to invoke the Sherman Act, the New York Antitrust Statute applied as well; for the "exhibition and display of these motion pictures is of substantial local significance, regardless of the interstate commerce activities involved in making films available for such exhibition and display." 186 Misc. at 284, 58 N. Y. S. 2d at 308. There is also some older federal and state authority dealing specifically with antitrust which has considered the question in terms of mechanical formulae such as the point of passage of title, compare *Cole Motor Car Co.* v. *Hurst*, 228 F. 280 (CCA 5th, 1916), cert. den. 247 U. S. 511 (1918) with *Kissell Motor Car Co.* v. *Walker*, 270 F. 492 (CCA 5th, 1921), or whether the property had become merged in the general mass of property in the state. *Standard Oil* v. *States*, 107 Miss. 377, 65 So. 468 (1914) (oil came to rest in state; was incorporated in mass of property therein; state law applicable). See also *Comm.* v. *Strauss*, 191 Mass. 545, 78 N. E. 136 (1906), *writ of err. dism.* 207 U. S. 599 (1907). And see the general, though antiquated, discussion in 24 A. L. R. 787 (1923). But such touchstones have been specifically disavowed. *Parker* v. *Brown*, 317 U. S. 341, 362 (1943); *Panhandle Eastern Pipe Line Co.* v. *P. S. C. of Indiana*, 332 U. S. 507, 512 (1947).

of actual conflict,[9] the Federal antitrust laws make no demands for supremacy, preemption, "primary jurisdiction" or the exclusion of state exercise of sovereignty.[10] Like Federal antitrust, State antitrust seeks only to eliminate burdens on commerce. As Mr. Justice Holmes put it, in upholding the Tennessee antitrust law against the challenge that it impinged upon a preempted field, "The mere fact that it may happen to remove an interference with commerce among the States . . . does not invalidate it. . . . [C]ertainly there is nothing in the present state of the law at least that excludes the states from a familiar exercise of their power." [11]

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9 See *e.g., Guss* v. *Utah Labor Relations Bd.*, 353 U. S. 1 (1957); *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468. A leading case on actual conflict between state and federal regulation of commerce is *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148 (1942), involving Alabama and federal law on the renovation of butter. See also *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1947).

10 Of course state economic regulations may fall when they conflict with the federal antitrust laws. See *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384; *cf. United States* v. *Bowman Dairy,* 89 F. Supp. 112 (N. D. Ill. 1949).

11 *Standard Oil Co.* v. *Tennessee,* 217 U. S. 413, 423 (1910) Justice Holmes went on to add, "It would hardly be an answer to an indictment for forgery that the instrument forged was a foreign bill of lading, or for assault and battery that the person assaulted was engaged in peddling goods from another state". *Ibid.* See also *Straus* v. *American Publishers Ass'n,* 231 U. S. 222 (1913). Held there was that federal copyright confers no immunity from state antitrust, indicating also that the combination was not exempt from the Sherman Act and implicitly approving application of state and federal antitrust to the same subject matter. Justice Black dissenting in *Gibbs* v. *Buck,* 307 U. S. 66, 79, 83 (1939), has written that "a state law prohibiting monopolistic price fixing in restraint of trade is not 'novel' and 'unique' and raises no 'grave constitutional questions.' The constitutional right of the States to pass laws against monopolies should now be beyond possibility of controversy." The majority had upheld the discretion of the trial court in granting a temporary injunction against the state law on the ground of its conflict with the copyright laws. But Justice Black's view prevailed in *Watson* v. *Buck,* 313 U. S. 387 (1941), in which the injunction was vacated when the *Gibbs* case reached the Supreme Court on the merits. Further indication of constitutionality appears in *U. S.* v. *South-Eastern Underwriters,* 322 U. S. 533, 562 (1946) where answering an assertion of clash between the Sherman Act and State insurance laws, the Supreme Court held that the question was whether *conflict* existed, not mere coincidence of regulation.

Supporting this conclusion is the legislative history of the Sherman Act. Senator Sherman made clear that the states were not to be ousted from their traditional jurisdiction in this area:

> This bill . . . has for its . . . object to invoke the aid of the courts of the United States to deal with the combination . . . when they affect injuriously our foreign and interstate commerce . . . and in this way to supplement the

Only recently, the Supreme Court of Wisconsin considered this question.[12] The state had alleged a conspiracy among certain out of state corporations to fix the price of calcium chloride, a chemical product widely used in Wisconsin for the maintenance of public highways. At the request of the state Attorney General, after the defense had moved to dismiss the case on the claim that federal law preempted state law, the Department of Justice sent a letter for insertion in the record stating that our view was that our jurisdiction did not hinder the state's exercise of its sovereignty.[13] The Wisconsin court found that there was no preemption, no conflict, and no burden on commerce.

The rationale underpinning this conclusion is summed up in the recent *Report of the Special Committee to Study the New York Antitrust Laws of the New York State Bar Association.* As that group concluded, the State

> has a substantial and historic interest in preventing and ending restraints in . . . [certain] areas, which generally may be deemed to outweigh that of the national government. The state interest is enhanced by the fact that even though interstate commerce

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> enforcement of the established rules of the common and statute law by the courts of the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of those states. It is to arm the Federal courts within the limits of their constitutional power that they may cooperate with the state courts in checking, curbing and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States. . . . 21 *Cong. Rec.* 2457 (1890).

The best illustration of the dual role of state and federal jurisdiction in antitrust is seventy years of concurrent jurisdiction, beginning with the cases against The Standard Oil Trust. Between 1892 and 1906, 11 states brought 24 cases against the members of the Standard Oil Trust. See 1 *Whitney, Antitrust Policies* 101-102 (1958). At the same time the federal government brought its action which culminated in the landmark decision, *Standard Oil Co.* v. *United States,* 221 U. S. 1 (1911). In most of these state enforcement actions, the defense made the argument that state law had been preempted—but never in a state's antitrust prosecution has this argument prevailed. There are, however, cases between private parties in which the argument was—and erroneously, we believe—accepted. See, *e.g., Kosuga* v. *Kelly,* 257 F. 2d 48 (7th Cir. 1958) (Illinois law), aff'd on other grounds, 358 U. S. 516 (1959).

12 *State* v. *Allied Chem. & Dye Corp.,* 1960 Trade Cases Par. 69-608 (Wisc. Sup. Ct., 1959).

13 1960 Trade Cases Par. 69,608, at 76,435-36.

> technically may be affected by some of these restrictions, . . . federal enforcement has been withheld at least in many instances. Therefore, if the State were to proceed against such impediments without discriminating against interstate commerce, there would be no conflict with national policy or its administration. If there were an informal arrangement between state and national governments vesting enforcement of such local restraints in the state—recognizing, of course, that the federal government may proceed where it deems its interest paramount—the possibility of collision would be even further diminished. . . . [14]

To aid the development of such effective enforcement liaison is a prime purpose of our conference here today and tomorrow. So much for a brief, very brief, sketch of the States' antitrust enforcement power as well as some guide-lines for dividing State from Federal responsibility.

## II. *An Area for Possible State Consideration: Reporting by State Purchasing Officials to States' Attorneys General of Possible Rigged Bids on State Purchases*

Against this general background, I take the liberty of suggesting an area for State consideration. That area might involve Reports, perhaps periodically, by State Purchasing Officials to State Attorneys General of suspected rigged bids on state purchases. Armed with such data, State Attorneys General might then decide whether to investigate such problems themselves or refer them to the Justice Department's Antitrust Division. The purpose of such reporting would be to enable State Attorneys General, in appropriate cases, to eliminate the illegal restraints and to secure recompense for their State or its subdivisions injured by rigged bids. Appraising the wisdom of this suggestion, perhaps helpful is the Federal experience.

Historically, the problem of identical bidding has been with us since the 1861 statute making advertisement for competitive bids mandatory in all Federal government procurement.[15] However, not until 1948 was there action by Congress to set up a continuing pro-

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14 New York State Bar Association, Section on Antitrust Law, Report of the Special Committee to Study the New York Antitrust Laws, 632 (1957).

15 12 Stat. 220.

gram of selection of identical bidding cases to be reported to the Antitrust Division. This action, the Armed Services Act of 1947,[16] and the later Federal Property and Administrative Services Procurement Act of 1949,[17] form the basis for the Federal Government's identical bidding program. These statutes oblige each Federal agency to refer to the Attorney General such identical bids as in his opinion evidence a violation of the antitrust laws.

Improved regulations governing the method of reporting identical bids were issued by both the Armed Services and General Services Administration early in 1959.[18] Since the introduction of these new reporting procedures there has been a marked improvement in the quality of the identical bid references submitted. This stream of intelligence pinpoints the locus of competitive injury and adapts enforcement to the needs of various sectors of our economy. Identical bidding in Government procurement may, in some cases, be symptomatic of the avoidance of price competition and points up markets which warrant antitrust scrutiny. Of course, the absence of price competition in bidding on Government contracts does not establish a violation of the antitrust laws. In some markets, price rivalry may be subordinated to other forms of competition without overt agreement or concert of action among the competitors which, if present, would violate the antitrust laws.

However, in some areas, reports of suspected identical bids have triggered federal antitrust proceedings. These proceedings, already brought, have involved products that range from bread and milk to certain electrical items. Antitrust cases have been brought.[19] And

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16 Public Law 413, 80th Cong., 2nd Sess., 10 U. S. C. 2305(d).

17 Public Law 152, 81st Cong., 1st Sess., 41 U. S. C. 151(d).

18 Armed Services Procurement Regulation (1955 Edition Revised), 27 February 1959, Revision No. 44 and 41 U. S. C. A. Appendix, Rules & Regulations, Sections 1-1.901 to 1-1.903.

19 Several recent examples include *U. S.* v. *Beatrice Foods Co., et al.*, Cr. 0315, filed in 1958 and charging that three Omaha, Nebraska dairies engaged in a combination and conspiracy to eliminate and suppress competition in the sale of dairy products to Offutt Air Force Base and the U. S. Veterans Hospital near Omaha; *U. S.* v. *Carter Products, Inc., et al.*, 60 Civ. 375, filed Jan. 27, 1960, charging the two leading manufacturers of the largest selling of the mild tranquilizers with fixing prices on bids and excluding others from the manufacture and sale of tranquilizers made with meprobamate as the sole active ingredient; and three indictments filed Feb. 16, 1960, charging General Electric Co., Westinghouse Electric Corp., Allis-

the public's right to competitive bidding, in appropriate areas, has been safeguarded.[20]

This experience may well be helpful to those at the State level that may have the responsibility for developing a reporting program. State officials may well wish to examine the federal agencies' regulations governing the reporting of identical bidding cases to the Antitrust Division. Also, perhaps helpful will be steps taken to avoid a flood of reports—to weed out early in the game reports that will perhaps not be fruitful. In this connection, members of the Antitrust Division staff, who have been most closely associated with the Federal system of reporting identical bids, will be available for consultation and such assistance as they may be in a position to offer.

## III. *The Federal Government's Responsibility*

The Federal Government, let me emphasize, has a responsibility here too. In some antitrust cases brought by the Federal Government, the primary parties injured may be States or Cities throughout the country. When States or Cities have been hurt by an antitrust violation, the law provides that a State or City may sue and recover treble damages. The Supreme Court has held that Congress intended to grant the States a right to sue to recover treble damages on behalf of their citizens.[21]

Though Congress intended this remedy, ofttimes it may be less than fully effective. A State or City may know its citizens have been hurt. But the resources to investigate and prove that antitrust conspiracy from which its damages stemmed may not be at hand.

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Chalmers Mfg. Co., I-T-E Circuit Breaker Co., Federal Pacific Electric Co. and 18 individuals with conspiracy, collusion, bid rigging and market sharing in various heavy electrical products. Since Feb. 16, 1960, a total of 16 additional indictments have been returned in Philadelphia, affecting every major sector of the electrical equipment industry.

20 The *Omaha Dairy* case illustrates that favorable price results may be obtained in Governmental procurement from the initiation of antitrust actions. In this case, it was observed that within a week of the conclusion of our preliminary investigation one of the defendants, whose prices had not deviated in three and one-half years of bidding on Air Force contracts, submitted a bid 8 percent below its previous bid, affording the Government a saving of $4,000 on one item alone. Substantial savings on other dairy product items also were obtained at the same time.

21 *Georgia* v. *Evans*, 316 U. S. 159.

In light of this difficulty States face, this division has been considering means for handling its antitrust litigation with an eye toward aiding State Attorneys General to protect the interest of injured States or Cities. Assume the Federal Government proceeds, with both civil and criminal suits, against an antitrust offense that has damaged a State or its subdivision. On the one hand, if defendants plead guilty, or are adjudged to have violated the law after a criminal or civil trial, then States or Cities may be able effectively to protect their interests. For, as the Supreme Court has made clear, States or Cities then "have available to them all matters previously established by the Government in antitrust action . . . [They enjoy] as large an advantage as the estoppel doctrine would afford had the [Federal] Government brought suit." [22]

On the other hand, as often happens, if defendants plead *nolo contendere,* as distinct from guilty, and enter a consent decree, rather than go to trial, then States or Cities hurt by the antitrust offense may be left out in the cold. For then injured States or Cities have to investigate and prove in Court the existence of the antitrust conspiracy itself, a conspiracy that violated Federal—not State—law, before they can recover. And this, States or Cities are ofttimes in no position to do.

It is this problem that the Antitrust Division, in cooperation with interested State Attorneys General, have been seeking to overcome. Thus, in cases where States or Cities have been hurt, and where the Courts have, over the Antitrust Division's objections, accepted *nolo* pleas, the Division is now appraising the wisdom of considering as one element of public interest test which guides acceptance or rejection of a civil decree, the interest of a State or its subdivisions primarily injured by the violations alleged. This means that, in appropriate civil cases, the Division has offered defendants the alternative of proceeding to trial or accepting a consent decree that protects the State's interests.

One means thus far discussed has been the inclusion in the Federal consent decree of an injunction against contesting antitrust liability in any subsequent suit by a State or City to collect damages. If defendants choose to litigate the issue of antitrust liability, then they must do it in the context of the Federal proceeding—where the Anti-

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[22] *Emich Motors* v. *General Motors,* 340 U. S. 558, 568.

trust Division has evidence of violation close at hand and is presumably well schooled in presenting such evidence.

An antitrust defendant, on the other hand, may choose to waive its right to contest antitrust liability in any subsequent State damage suit. In that event, the issue left in any subsequent State damage proceeding would simply be the question of whether or not the State was hurt and, if so, how much?

Such issues—the fact and extent of damage—seem peculiarly within the States' competence to ascertain and prove. For it is the State that will likely know where and how much its operations have been hurt. And it is the State that should have most ready access to data and witnesses needed to prove its damage.

Let me emphasize some limiting factors in this evolving policy. First, it would apply only where one or more States have borne the primary brunt of violations alleged, and it would be carefully limited to subsequent State or City—as distinct from private—damage proceedings.

Beyond that, even where States or Cities may have been the primary parties injured, insistence on a decree waiving any contest of liability may not always be appropriate. Finally, this policy should come into play only where an injured State already filed its damage proceeding or indicated its intent to promptly do so. Then any antitrust trial stemming from a defendant's refusal to waive contest of liability would spell no unintended added burden to any court. In short, with the State damage proceeding filed or in the immediate offing, the court is thus faced with trying out the issue of liability in either the State or the Federal case.

There is not yet sufficient data rooted in our case by case experience to make any broad conclusions as to the wisdom of this policy. However, the hopes of some State Attorneys General are high. And many feel that such cooperative endeavor may well aid in making real those damage remedies which Congress has provided the States.

This effort accords not only with the Congressional design for antitrust, I submit, but with basic considerations of comity at the heart of our Federalism.

Initially, the Congress long ago evidenced its special concern for minimizing burdens to recompense for private parties injured by anti-

trust violations. As the Supreme Court put it, almost a decade ago in *Emich Motors:*[23]

> Congressional reports and debate on the proposal which ultimately became [Clayton Act] Section 5 reflect a purpose to minimize the burdens of litigation for injured . . . suitors by making available to them all matters previously established by the Government in antitrust actions. . . .

The very purpose of this provision, one district court recently concluded,[24] was that the Federal Government "assist or encourage" injured parties, "by reducing the almost prohibitive costs and staggering burdens of . . . [antitrust] litigation . . . "

True, to aid the Attorney General in securing consent decrees otherwise in the public interest, Congress did not secure Section 5's benefits for injured parties where the Federal Government's case was terminated by "consent judgments or decrees entered before any testimony has been taken . . ." (15 U. S. C. 16). Equally true, however, Congress by no stretch obliged the Attorney General to consent to those judgments or decrees that do not serve the public interest. Beyond doubt, deciding to which "judgments" the "consent" of the United States shall be given, law enforcement officials must be governed by the public interest. And one ingredient of the public interest must be the legitimate interests of the several States. And the means chosen to protect those interests—acceptance of a consent decree that protects the States' concern or "the simple process of the Attorney General going forward in the trial of the civil suit"—are precisely those, one Court has indicated,[25] that the Congress envisioned.

For as the Supreme Court put it many decades ago:[26]

> We live in the jurisdiction of two sovereigns, each having its own system of courts to decree and enforce its laws in a given territory . . . The situation requires, therefore, . . . a spirit of reciprocal

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[23] *Emich Motors* v. *General Motors,* 340 U. S. 558, 567-568.

[24] *United States* v. *Standard Ultramarine & Color Co.,* 137 F. Supp. 167 (S. D. N. Y.)

[25] *United States* v. *Cigarette Merchandisers Assn.,* 136 F. Supp. 212, 213.

[26] *Ponzi* v. *Fessenden,* 258 U. S. 254, at 259.

comity and mutual assistance to promote due and orderly procedure.

*Conclusion*

It is entirely fitting, I suggest, that Federal-State "cooperation" be manifest in the antitrust enforcement area. For as Professor Kingman Brewster recently put it so well:

> "The virtue of leaving considerable economic power" in numerous "private hands is not too dissimilar from the virtue of leaving considerable political power in the several states of a federation. In the negative sense both reject centralism . . . More important, both exponents of states' rights and those who would leave economic power in private hands are affirming that more socially constructive energies will be released in the long run if problems can be attacked by and left to the final decision of those living closest to them. . . . [Both seek] maximum play for diverse solutions to comparable problems." [27]

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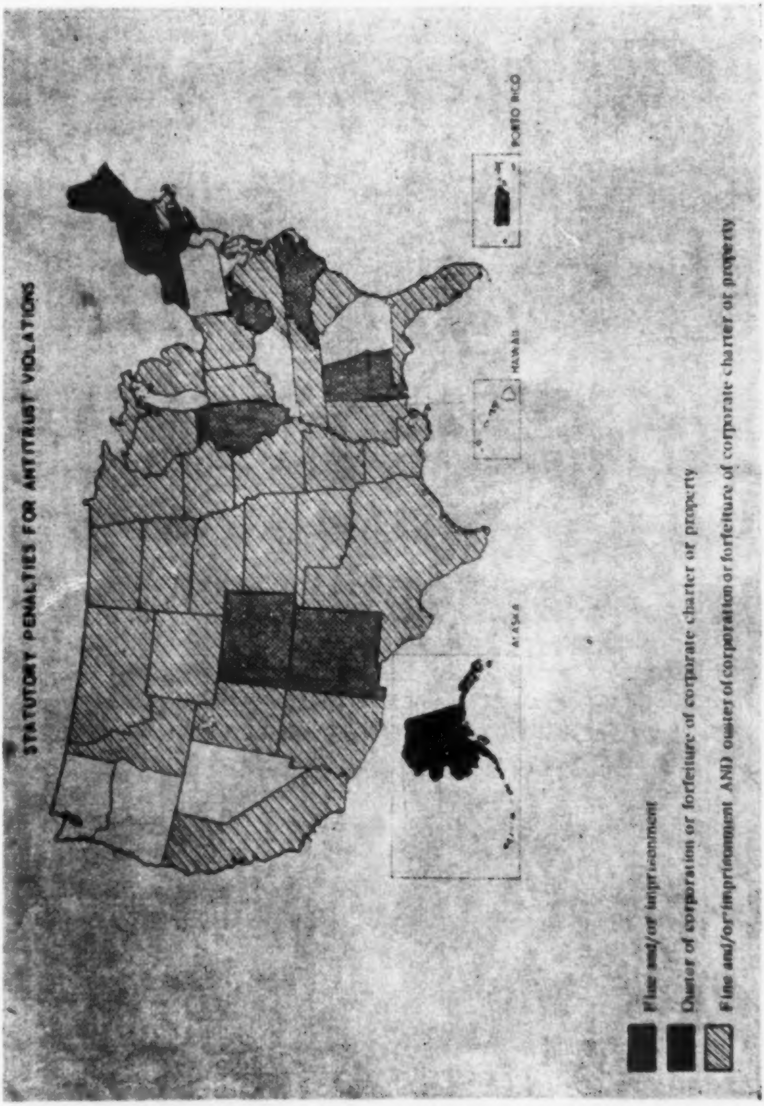
[27] Chapter IV, *The Corporation and Economic Federalism*, by Kingman Brewster, Jr., pp. 75-76.

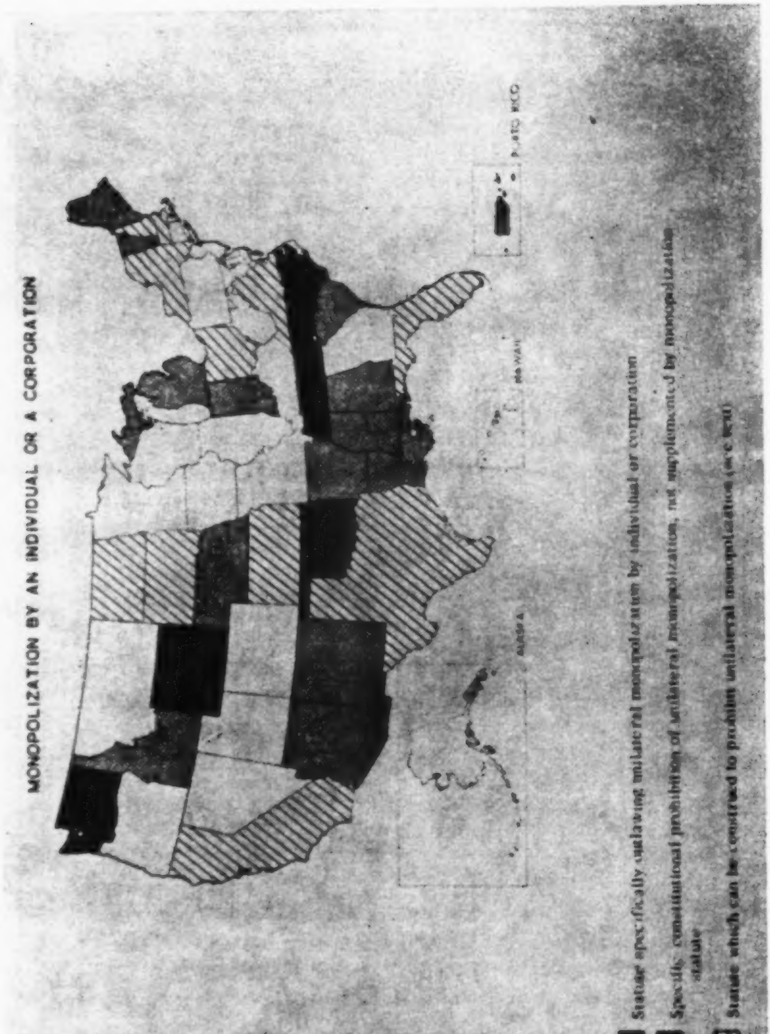

RESPONSIBILITY FOR ENFORCEMENT OF STATE ANTITRUST LAWS
ALASKA
HAWAII
PORTO RICO
State Attorney General
District or County Attorney
State Attorney General and District Attorneys each responsible
NOTE: In Alaska the Director of Finance is charged with bringing ouster proceedings against foreign corporations party to combinations in restraint of trade.


PUERTO RICO
HAWAII
ALASKA
Specific anti price fixing statute
Express constitutional prohibition of price fixing, but no specific anti price fixing statute
General statutory prohibition of restraints, construed by case law to cover price fixing
Statute prohibiting price fixing in necessities of life only
NOTE: Alabama has a statute forbidding price-fixing conspiracies between corporations, or stock companies. West Virginia bans buying of goods for the purpose of raising prices in necessities.


STATUTORY PENALTIES FOR ANTITRUST VIOLATIONS
ALASKA
HAWAII
PORTO RICO
Fine and/or imprisonment
Ouster of corporation or forfeiture of corporate charter or property
Fine and/or imprisonment AND ouster of corporation or forfeiture of corporate charter or property


STATES PROHIBITING CONTRACTS IN RESTRAINT OF TRADE
HAWAII
PORTO RICO
NOTE: Wyoming has a penal law against tie-in contracts, but no other antitrust laws.
States having Constitutional or Statutory prohibitions against contracts in restraint of trade
States prohibiting contracts in restraint of trade and having additional prohibitions against exclusive dealing contracts


STATE ANTITRUST LAWS THAT THE SOVEREIGN MAY ENFORCE INJUNCTIVELY
ALASKA
HAWAII
PUERTO RICO
Neither statute nor constitutional provision, but case law permits


MONOPOLIZATION BY AN INDIVIDUAL OR A CORPORATION
ALASKA
HAWAII
PUERTO RICO
Statute specifically outlawing unilateral monopolization by individual or corporation
Specific constitutional prohibition of unilateral monopolization, not supplemented by monopolization statute
Statute which can be construed to prohibit unilateral monopolization (see text)

# COUNSELLING CLIENTS IN THE APPLICATION OF COST JUSTIFICATION STUDIES TO PRICING BEFORE A COMPLAINT IS FILED

by

ALBERT E. SAWYER*

This afternoon I speak from the standpoint of an attorney counselling a client in the pre-complaint period of a prospective section 2(a) Robinson-Patman pricing situation where the defense of cost justification of a price differential is in contemplation. We will want to consider what advice I can give at this stage which will lead to a determination that such a defense is feasible and worth the effort that will be required. If the decision is to go forward with a cost justification defense then what can I, as an attorney, impart to the prospective respondent's accountants by way of guides as to how to proceed. What can I say that will lessen the task from their standpoint? Assuming that the study, when completed, offers the basis for a claim that the differential is cost justified then is it advisable to approach the Federal Trade Commission and if so, at what level and under what conditions? We would then want to consider how to cope with the several types of problems and procedures which may arise during the course of the informal pre-complaint conferences with Commission accountants and the bearing these may have upon the subsequent course of the proceeding.

This is a large order to cover in the brief time at my disposal here but I will do the best I can to at least outline the problem as I see it.

At the outset I should like to correct the impression which has gained a strong foothold to the effect that the effort to utilize the cost justification proviso of Section 2(a) is largely illusory, that the rigid standards that have been applied by the Commission and the Courts have all but nullified the purpose for which the Congress included this escape clause in the statute.

It is misleading to attempt to appraise the Federal Trade Commission's administration of the cost justification proviso of the Robinson-

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Patman Act by scoring apparent failures and successes. During the first twenty years in which the Act has been in force the proviso has been invoked as the principal issue in fourteen cases.[a] In seven other cases the cost proviso was invoked as one of several issues.[b] In nine of these cases the complaint was dismissed as to all or most of the differentials in question.[c] Considering the fact that a number of these cases, particularly those brought in the first ten year period of enactment, concerned differentials initiated prior to 1936 in which the

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COST-SAVINGS DEFENSES

Cost Justification Defenses to Complaints Issued by Federal Trade Commission. 1936-1959

[a] Cost Justification was the principal issue in the following 14 F. T. C. cases:

1. *Bird & Son, Inc.*, FTC Dkt. 2937 (1937) 25 F. T. C. 548.
2. *Standard Brands*, FTC Dkt. 2986 (1939) 29 F. T. C. 121.
3. *E. B. Muller & Co.*, FTC Dkt. 3224 (1941) 33 F. T. C. 24.
4. *Morton Salt Co.*, FTC Dkt. 4319 (1944) 39 F. T. C. 35.
5. *Standard Oil Co.*, FTC Dkt. 4389 (1945) 41 F. T. C. 263.
6. *The Curtiss Candy Co.*, FTC Dkt. 4673 (1947) 44 F. T. C. 237.
7. *Minneapolis-Honeywell Regulator Co.*, FTC Dkt. 4673 (1948) 44 F. T. C. 237.
8. *United States Rubber Co.*, FTC Dkt. 4972 (1950) 46 F. T. C. 998.
9. *International Salt Co.*, FTC Dkt. 4307 (1950) 49 F. T. C. 138.
10. *Champion Spark Plug Co.*, FTC Dkt. 3977 (1954) 50 F. T. C. 30.
11. *B. F. Goodrich Co.*, FTC Dkt. 5677 (1954) 50 F. T. C. 622.
12. *Sylvania Electric Products, Inc.*, FTC Dkt. 5728 (1955) 51 F. T. C. 282.
13. *C. E. Niehoff & Co.*, FTC Dkt. 5768 (1955) 51 F. T. C. 1114.
14. *Thompson Products, Inc.*, FTC Dkt. 5872 (1959) Trade Cases, ¶27,841.

[b] In 7 other F. T .C. cases the cost justification defense was one of several issues:—

1. *Kraft-Phenix Cheese Corp.*, FTC Dkt. 2935 (1937) 25 F. T. C. 537.
2. *Bissell Carpet Sweeper Co.*, FTC Dkt. 4636 (1945) 40 F. T. C. 738.
3. *Horlicks Corp.*, FTC Dkt. 5701 (1950) 47 F. T. C. 169.
4. *Moog Industries, Inc.*, FTC Dkt. 5723 (1955) 51 F. T. C. 931.
5. *Hamburg Bros., Inc.*, FTC Dkt. 6721, 1959 Trade Cases, ¶27,195.
6. *H. C. Brill Co., Inc.*, FTC Dkt. 3299 (1938) 26 F. T. C. 666.
7. *U. S. Rubber Co.*, FTC Dkt. 3685 (1939) 28 F. T. C. 1489.

[c] In the following nine cases the complaint were dismissed as to all or most of the differentials in question:

1. *Bird & Son, Inc.*, FTC Dkt. 2937 (1937) 25 F. T. C. 548.
2. *B. F. Goodrich Co.*, FTC Dkt. 5677 (1954) 50 F. T. C. 622.
3. *Minneapolis-Honeywell Regulator Co.*, FTC Dkt. 4920 (1948) 44 F. T. C. 351.
4. *U. S. Rubber Co.*, FTC Dkt. 3685 (1939) 28 F. T. C. 1489.
5. *Sylvania Electric Products, Inc.*, FTC Dkt. 5728 (1954) 51 F. T. C. 282.
6. *Kraft-Phenix Cheese Corp.*, FTC Dkt. 2935 (1937) 25 F. T. C. 537.
7. *Bissell Carpet Sweeper Co.*, FTC Dkt. 4636 (1945) 40 F. T. C. 738.
8. *Horlick Corp.*, FTC Dkt. 5701 (1950) 47 F. T. C. 169.
9. *Hamburg Brothers, Inc.*, FTC Dkt. 6721, 1959 Trade Cases ¶27,195.

attempt at justification was a belated afterthought, the overall score does not seem to warrant the harsh judgment of futility that is sometimes visited upon the proviso.

In the *Minneapolis-Honeywell Regulator Co.* case, the Commission accepted partial justification of respondent's annual volume discount scale. No cost justification was attempted as to certain other price differentials in the scale. The Commission, in sustaining the respondent's partial cost justification recognized certain practical difficulties in the case, stating as follows:

> "Cost studies of the sort presented in this matter ordinarily do not afford precise accuracy but must necessarily embrace a number of conjectural factors and allocations. There is inherent in them a reasonable margin of allowable error. Where they are made in good faith and in accordance with sound accounting principles, they should be given a very great weight. Respondent had an extensive cost study made by an independent firm of accountants and auditors which disclosed cost justification for the price differentials resulting only from brackets 1 through 3A. It apparently was made with considerable care and great particularity of detail. Although basic questions may properly be raised with respect to the soundness of certain of the procedures and allocations upon which the cost differentials were determined, respondent's effort represents a fair and objective study of the problems which was probably done as well as it could be done under the circumstances. Respondent's burden under the act is very great and it should have a liberal measure of consideration when it becomes apparent that it has made sincere and extensive efforts to discharge that burden. We have accordingly accepted the results of the cost study as fairly reflecting respondent's cost differentials within a reasonable margin of error."

In the *United States Rubber Co.* case, the Commission found that certain of the respondent's price differentials were unjustified by cost differences in amounts ranging from \$.0047 to \$.0480 per dollar of gross sales. The Commission held that:

> "The unjustified price differences shown above in the amounts of .0064, .0047 and .0092 per dollar of gross sales would be considered by the Commission to be *de minimis* and would not

> warrant the issuance of an order to cease and desist if they were the only price differences found to be not justified by differences in costs. However, the other amounts by which the differences in costs fail to justify the differences in prices are substantial."

Shortly after the passage of the Robinson-Patman Act, the Federal Trade Commission issued *"A Brief Summary of 64 Robinson-Patman Cases,"* containing a short statement of the charge, the facts and reasons why the matter did not result in formal complaint. In five of the 64 cases, the matter was dismissed on the basis of a cost justification by the proposed respondent. In two of the five cases, the Commission found that a carload price differential was justified by the lower cost of selling, handling and shipping a carload as compared with less than a carload. In the other three cases, distribution cost differences justified the price differentials involved. In one of the latter cases, the Commission sustained the cost defense submitted by the seller. although incomplete, on the ground that there was "much to indicate" economies in materials, styling, and selling, which effected savings commensurate with the discount differential. In the light of such "indications" the Commission was of the opinion that a full-scale cost study would not be justified and closed the case.

On April 17, 1951, the F. T. C. issued a complaint against *Thompson Products Inc.* (Docket No. 5872). The respondent is a manufacturer of automotive parts, some of which are sold to manufacturers of automobiles and other machinery for assembly in original equipment. Other sales are made to these same customers for sale as replacement parts to purchasers of their original equipment. The Company also engaged in a large general replacement parts business for which it has provided extensive warehousing facilities and it maintains a sales organization for its distributor trade and further exercises a certain degree of control over the jobbing trade which is supplied by its distributors.

The complaint was broad and involved a number of issues. Three separate cost justification studies were submitted. At this writing, the Commission has adopted as its Final Order the Initial Decision of the Trial Examiner with but one modification which is discussed later.

At the Examiner level a study justifying a volume rebate plan among its distributors was sustained. A second study in support of a price differential between its distributors, who were its direct cus-

tomers, and franchised "jobbers" who purchased from the distributors, apparently was sustained because there is no indication in the record that the study was inadequate. The Examiner did not rule the differential to be an illegal discrimination and the Commission concurred.

The third issue supported by a cost study involved a feature that is unique in cost justification proposals. In an effort to sustain a substantial price differential between its distributors and its original equipment customers in relationship to sales of parts for the replacement trade the respondent sought to charge into the cost of doing business with the distributors, a factor representing what was urged to be a fair rate of return upon the respondents multi-million dollar investment in buildings, equipment and inventory devoted exclusively to providing adequate replacement part service to its distributor and jobber trade. This the Examiner and the Commission rejected.

There is a series of treble damage actions against the American Can Company. In addition, in 1950, E. M. Reid, operating a business in Toledo, Ohio known as the College Book Exchange culminated its long continued effort to be classified by the publishers as a wholesaler rather than a retailer, by bringing over thirty treble damage suits against various publishers. The complaint against Harper Brothers was tried in the Southern District of New York in 1955. Another case against Doubleday & Company was tried in the District Court in Toledo. In this case, tried before a judge, the plaintiff was successful. No cost defense was pleaded in this case. In the *Harper* case, which was tried before a jury requested by the plaintiff, an extensive cost defense was presented by Harper. The jury returned a general verdict for the defendant. This was appealed by Reid to the Circuit Court of Appeals (235 F. 2d 420) which also ruled against him. An application for a writ of certiorari to the Supreme Court was denied. These proceedings illustrate the difficulties of dealing with the intricacies of a cost defense before a jury but yield little of value by way of court rulings on the cost justification issue. Beyond these decisions the only other judicial pronouncement is that of Mr. Justice Frankfurter in the *Automatic Canteen* case. In laying the background for the decision in that case, the Justice said:

> "We have been invited to consider . . . some of the intricacies inherent in the attempt to show costs in a Robinson-Patman Act proceeding. The elusiveness of cost data, which apparently can-

> not be obtained from ordinary business records, is reflected in proceedings against sellers. Such proceedings make us aware of how difficult these problems are, but this record happily does not require us to examine cost problems in detail. It is sufficient to note that, whenever costs have been in issue, the Commission has not been content with accounting estimates; a study seems to be required, involving perhaps stop-watch studies of time spent by some personnel such as salesmen and truck drivers, numerical counts of invoices or bills and in some instances of the number of items or entries on such records, or other such quantitative measurement of the operation of a business." *Automatic Canteen Co. v. Federal Trade Commission,* 346 U. S. 61 (1953).

This language indicates that the Supreme Court is not unaware of the magnitude of the task facing a seller in preparing a cost justification defense.

As a prelude to the first inquiry as whether or not the effort at cost justification should be made at all, a few words of guidance about your clients' general attitude toward compliance with the Robinson-Patman Act, especially Sec. 2(a), are in order.

It may be inferred from what is said in the Taggart Report and the Attorney General's Report as to the nature of cost determination in justification proceedings that it would be unduly burdensome for the usual business concern to "build into" its daily accounting procedures a continuing check upon differential justification. This does not mean, however, that a "spot check" of key price differential programs may not be highly effective in preventing a company from drifting into a defenseless position in the event of a formal challenge.

The outstanding lesson to be learned from the past twenty-four years of the administration of this act is the importance of the burden placed upon the seller by the cost justification proviso, to proceed in good faith with his disclosure of the cost defenses upon which he relies.

The very fact that a seller has acknowledged his legal responsibility under Sec. 2(a) to the extent of making preliminary tests from time to time of the principal differentials in his pricing practices is, in itself, a long step forward in establishing a basis of good faith operation.

Lawyers dealing with the Commission at the staff level in preliminary discussions prior to the possible issuance of a complaint, attest to the efficacy of being able to show that positive efforts to justify

differentials have already been prepared by the potential respondent. An atmosphere of reasonableness is more likely to pervade the discussions that follow and it is often possible to work out a mutually acceptable solution to the inquiry without resort to formal complaint procedure. This does not imply a lowering of the criteria of justification by the Commission or its staff under these conditions. It does mean that the evidence of a good faith effort to comply with the law in advance of a challenge tends to greatly reduce the area of possible controversy.

A "spot check" test of the justifiability of particular differentials need not be the ponderous undertaking which the requirements of a litigated case impose. In the first place, many differentials require little effort to establish one of two facts: that their justification is readily apparent or that their justification is a clear-cut impossibility. Thus reduced to the marginal situations which lie between, the task remaining is one of skillful sampling of the principal factors which offer the possibility of justification. These procedures should not be burdensome to be effective in weeding out indefensible situations and as to the others, of being prepared with a thesis of defense should an inquiry be instigated.

Aside from this general approach aimed at providing evidence of good faith attitude toward the requirements of the Act, what further advice may counsel give to aid in deciding whether or not to go forward with a cost justification study in advance of a complaint?

First of all, counsel can assist the accountants to determine the differential or series of differentials, to be justified. This is a legal question rather than an accounting question and its correct answer requires of counsel a knowledge of the cases that have adjudicated this question. Time does not permit me to do more than point out counsel's obligation here.

When the proper differentials have been defined counsel may be helpful in probing the business reasons for the establishment of these differentials. How long have they been established and from what complex of business necessities did they arise? This may lead to an important decision to rely more heavily upon the defense of meeting the equally low price of the competitor under Sec. 2(b) of the Act and may even go so far as to rule out cost justification as such. Here counsel must step with great caution. Sec. 2(b) has a very shaky record as a defense from a charge under Sec. 2(a). It is difficult,

if not almost impossible, for counsel to speak with great confidence as to this defense. In reaching this decision counsel should be certain that his study has exhausted the list of cases impinging upon the defense of meeting competition.

If these explorations lead to the decision to go forward with the study of cost justification what contribution, if any, can counsel make during the progress of the accounting study? Being an accountant as well as a lawyer I know the temptations which beset the accountant when engaged in such a task. Professional curiosity is inspired by such a prospect to inquire into many facets of the overall cost problems which are encountered in the course of a cost justification study. Many of these may be irrelevant to the issue of differential justification and much time may be needlessly wasted by the pursuit of these side issues. Counsel can materially help the progress of the study by a constant review for the purpose of testing relevancy. Counsel can contribute also if he has a working knowledge of all the principal cases in which the justification issue has played a prominent part. He should strive to keep alive the accountant's imagination without which his chance of success becomes very limited. This type of study is not the every day accounting problem. It provides a challenge to employ new techniques and new processes of analysis and, without intruding upon the domain of the accountant, counsel may properly stimulate the kind of resourcefulness that these assignments require.

Very few concerns maintain a constant record of the disposition of salesmen's time spent in soliciting business. A special study is required. The magnitude of this kind of study indicates the need of proper sampling techniques to bring the task within the bounds of cost and time allowance. The Commission recognizes this necessity and will, if called upon, indicate informally, their views as to the adequacy of the sample decided upon. Reference to the Commission staff at this point is not necessarily advisable. The criteria for proper sampling are well known to accountants and if these are observed in good faith and I underscore good faith, the study may proceed with confidence.

What to include or exclude in the course of such a study requires a constant awareness of the result which is sought.

Differentials in delivery cost may be of utmost importance in some instances and of negligible importance in others. Likewise, order handling costs and billing and credit procedures may yield much help-

ful differential data in some cases and yet in others be such a small amount in relation to the sales dollar and the amount of the differential to be justified as to offer little reward for the difficulties encountered in this type of analysis. Differentials in sales solicitation time are usually the most productive source of justification for quantity differentials but their ultimate value in the study may vary greatly dependent upon the manner in which the salesmen are compensated. If much of the compensation is based on dollar amounts sold, *i.e.*, payment on a commission basis, any differential from this source will tend to disappear. Differentials in production cost are most helpful where they exist and counsel should be certain that these opportunities are not missed.

In due course the accountants will present to counsel what purports to be a finished study. This will require careful scrutiny by counsel. If the differential to be justified is a single percentage discount the acceptance of the study may not prove difficult. The amount justified will seldom be the mathematical equivalent of the discount. This the Commission has consistently recognized. If the variation is an amount in excess of the discount, acceptance is easy. If, however, there is a shortage or failure of justification to a certain extent a careful appraisal of this shortage is required. In several cases the Commission has acknowledged that the amount of the shortage was so small in relation to the amount of the discount as to either be *de minimis* or not to have the capacity or tendency to injure competition. Counsel must be familiar with these rulings and be prepared to apply them to the results presented to him.

A somewhat more complicated problem is presented when the subject of the justification is a schedule of quantity discounts consisting of a number of brackets in an ascending scale.

It can be said at the outset that unless there is full justification between the smallest allowance and the highest allowance there is little basis for claiming any justification even though some measure of justification may exist among other brackets.

Must each bracket be justified in relation to every other bracket? This question has arisen in several cases, notably *United States Rubber* v. *F. T. C.* and the *Thompson Products* case. In the former the failure of justification was very small and the *de minimis* rule was applied and that part of the scale justified. In the *Thompson* case the problem appeared in connection with one of the three separate cost studies

presented in that case. Several significant failures of justification appeared within intermediate brackets on the quantity discount scale. Supplementary studies were made which examined into the make-up of the conflicting brackets and it was shown that the customers affected were actually not in competition with each other because they were located in non-competing marketing areas. The Examiner and the Commission accepted the results on the basis of the testimony of the Commission accountant that the differences were insignificant. There is some indication in these cases that differences of less than 1% of the sales price were not regarded sufficient to cause the failure of justification. However, counsel should be warned that the circumstances of some situations might make reliance upon this 1% ruling a dangerous step unless it is accompanied by competent evidence of its *de minimis* effect upon competition.

At this point, if all of the problems have been resolved in favor of an acceptable justification, consideration may be given to the presentation of the study to the accounting staff of the Commission.

The manner in which this is done depends upon the status of the proceeding if one then exists. Until an investigation is authorized by the Commission no proceeding exists. There are some circumstances, however, where it may be advantageous to come forward with a study. In that event counsel would contact the Chief Accountant for the Commission and state the circumstances which prompt the submission. The accountant may in his discretion accept the submission for informal review although this would not be binding upon the Commission or its staff should a proceeding subsequently be instituted. It would, however, be a helpful guide to the standards required by the Commission.

After an investigation has been authorized by the Commission, a proceeding exists and it is in charge of one of the attorneys of the Commission. Counsel's contact would be with this attorney and through him to the accounting staff of the Commission. The procedure is still in an informal state and in most instances is an exchange of views across the conference table, the Commission's accountants making suggestions here and there were weaknesses may appear. There is opportunity for supplemental studies to be prepared to strengthen such weaknesses. In those cases in which counsel is fortunate to find Commission accountants in agreement with his conclusions it follows that counsel for the Commission in charge of the investigation must

recommend that the file be closed without issuance of a complaint so far as the charges under Sec. 2(a) are concerned. Commission counsel seldom go contrary to the recommendations of the accountants for the Commission and the hearing examiners have supported their recommendations with very few exceptions. Where disagreements do arise the advantage of the informal submission is the possibility of reducing the informal submission to a stipulation of facts, thus expediting a hearing upon the points in disagreement as to the application of the law to such facts.

I should point out that the procedures just described can sometimes be availed of after the complaint has been issued and before any hearings are held. When this is possible a great saving in time and effort can be achieved, especially if the accountants for the Commission recommend acceptance of the study.

Two procedural matters should be executed by counsel for the respondent or prospective respondent as the case may be. It is desirable to request the complete return of the submission without prejudice to its subsequent re-submission or modification should the study be rejected. If the matter is to be contested it is better to start the contest with a clean slate. The second matter which is best illustrated in the order dismissing a proceeding under Sec. 2(a) brought against *Hamburg Brothers, Inc.*, F. T. C. Dkt. 6721. The respondent had moved that the cost justification study upon which the dismissal was based be sealed and impounded against all but the Commission and its staff because it contained confidential business information which would be harmful to it if known generally to the trade. The motion was granted and the order so stipulates.

From this it appears that counsel plays an important part in the development of a cost justification presentation. It is not the kind of assignment that can be delegated to company accountants without close guidance. The task is one for expert judgment applied with a full knowledge of the cases which have come on for adjudication. It is equally important that the lawyer refrain from attempting to be his own accountant. There is plenty of room in these studies for the full play of both professional efforts, and success, in large part, stems from a proper blending of both disciplines.

# DOES SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT EXTEND THE CLAYTON ACT?

by

JAMES A. RAHL*

This question, unlike most antitrust questions, has a very clear answer as of the moment. In the recent *Grand Union* case, decided on August 12, 1960, the Federal Trade Commission asserted not only a power, but a duty to "supplement and bolster" Section 2 of the amended Clayton Act by prohibiting under Section 5 of the Federal Trade Commission Act "practices which violate the spirit" of the Act, but which are outside its letter.[1]

At first glance, it may seem that the Commission has attempted to invent a universal solvent for dissolving all opposition. Lawyers in private practice are likely to be as unfriendly to such an invention as was the chemistry professor in the well-known old joke concerning the student who said he had found a universal chemical solvent. Unlike the chemistry problem, however, the legal question is not so much that of finding a container in which the solvent can be kept, as it is that of ascertaining whether this doctrine is so broad that it will unsettle the best efforts to give sound and reliable antitrust advice.

The vagueness of the *Grand Union* doctrine is naturally somewhat discouraging to those who engage in antitrust counselling. The antitrust provisions of the Clayton Act, imperfect as they may be, have been islands of specificity in a sea of antitrust generalities. In many situations, the fairly specific descriptions of the transactions covered by Sections 2, 3, 7 and 8 have been extremely valuable guides for otherwise bewildered legal analysts. Now it is inevitable that it should be asked whether the Commission has turned these islands into a dangerous mirage.

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1 *The Grand Union Co.*, Dkt. 6973 (Initial Decision, September 30, 1959), approved by the Commission, August 12, 1960, 3 C. C. H. Trade Reg. Rep. par. 28,980.

## *The* Grand Union *Decision*

The *Grand Union* case was a key part of an attack made by the Commission against a number of related alleged violations of Section 2(d) of the Robinson-Patman Act. Section 2(d) makes it unlawful for a seller to give to a customer any payment for services or facilities connected with sale of a product unless payment is made on "proportionally equal terms to all other customers competing in the distribution" of the product. The Commission charged that a number of different firms had made payments to an advertising agency for advertising time on a large electric sign owned by the agency in the Times Square area of New York City. The payments, it was alleged, in part benefited Grand Union, a retail grocery chain which was a customer of most of the firms making the payments.[2] Grand Union had been granted a lease of the electric sign by the advertising agency, had obtained the participation of some of the suppliers concerned, and itself had used the sign for advertising. Proportionally equal payments by the suppliers were not made to competitors of Grand Union, it was charged, and therefore the section was violated by them.

The language of Section 2(d) of the Robinson-Patman Act applies only to sellers, and clearly does not apply to recipients of illegal allowances. Further, Section 2(f), the general buyer responsibility subsection of the Robinson-Patman Act, does not cover buyers who receive payments in violation of Section 2(d), or who receive services and facilities in violation of Section 2(e). It applies only to the receipt of the benefit of a "discrimination in price" which violates Section 2(a).

Therefore, in order to attack Grand Union's inducement of the illegal allowances, despite the clear inapplicability of the Robinson-Patman Act, the Commission charged that Grand Union had committed an unfair trade practice in violation of Section 5 of the Federal Trade Commission Act. The hearing examiner held that a Section 5 violation had occurred. He found that Grand Union had induced, or received, the benefits of payments which violated Section 2(d) with knowledge that the payments had not been made proportionally available to its competitors. The latter finding was a parallel of the

[2] 30 different firms, of which 28 were found by the Examiner to be suppliers of Grand Union, made payments for advertising on the sign. *Ibid.*

requirements of Section 2(f) as construed in the *Automatic Canteen* case.[3] That is, by knowing that the payments made were non-proportional, Grand Union would be chargeable with the necessary knowledge of ultimate illegality.

Before the full Commission, the validity of this use of Section 5 was attacked by respondent on the ground that it was contrary to Congressional intent. The Commission opinion, by Commissioner Secrest, summarized respondent's argument as follows:

> ". . . where Congress has affirmatively prohibited certain acts and at the same time has intentionally and expressly declined to render unlawful different but conceptually related acts, there is no room to argue that the acts exempted from proscription may, nevertheless, be considered illegal under the broad and ambulatory language of an earlier law." [4]

This contention was rejected. The Commission reviewed the legislative history of the Act, found that it was aimed at curbing the bargaining power of large buyers, and concluded that there was no indication that Congress intended to "exempt" buyer inducement of allowances, but instead that failure to cover this matter was more likely an "oversight." [5] Agreeing that Congress did not specifically prohibit such conduct, the Commission nevertheless stated "it cannot be inferred from this fact that Congress countenanced a practice which so clearly violates the spirit of the statute." [6]

From this first premise, based on its reading of legislative history, the Commission's opinion then took three extremely important further steps.

First, the opinion rejected the argument that the FTC Act "cannot be extended to proscribe discriminatory practices which do not

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[3] *Automatic Canteen Co.* v. *FTC*, 346 U. S. 61 (1953); see *Report of Attorney General's National Committee to Study the Antitrust Laws* (1955) 193; Massel and Gormley, "Business Methods and Antitrust Policy: The Automatic Canteen Case," 1 Antitrust Bulletin 345 and 467 (1955).

[4] *The Grand Union Co., Dkt.* 6973, August 12, 1960, opinion of FTC by Commissioner Secrest (mimeo.) 5-6.

[5] *Id.* at 5-10.

[6] *Id.* at 10.

come within the purview of the Robinson-Patman Act." [7] Second, directly quoting dictum from the *Motion Picture Advertising* case,[8] it said:

> ". . . it is our opinion that it is the duty of the Commission to 'supplement and bolster' Section 2 of the amended Clayton Act by prohibiting under Section 5 practices which violate the spirit of the amended Act . . ." [9]

And third, it indicated that this power extends to prohibition of inducement of a practice without any showing of adverse effect on competition, where Congress has made the practice a *"per se"* offense.

In a vigorous dissent, Commissioner Tait argued that the majority's supplementing of Section 2(d) of the Robinson-Patman Act, by pursuing things contrary to its "spirit," amounted to new legislation, and was also an unwarranted departure from the practice of requiring a showing of "probable injury to competition" in Section 5 cases. He concluded:

> ". . . in attempting to comply with the law, thousands of businessmen must first determine if the business practice is legal under the Robinson-Patman Act. Then they must also determine whether the practice is legal under a vague standard, herein stated to be 'the spirit of the amended Act.' I am in vigorous disagreement with an approach to the law which has too much sail and too little anchor, or too much supplement and too little bolster." [10]

Appeal of this decision is now pending in the Court of Appeals of the Second Circuit. Meanwhile, the principle announced has been referred to in the public addresses of Chairman Kintner.[11] It was

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7 *Ibid.*

8 *FTC* v. *Motion Picture Advertising Service, Inc.*, 344 U. S. 392, 394 (1953).

9 *The Grand Union Co.*, *op. cit. supra*, note 4 at 10-11.

10 *Ibid.*; dissenting opinion by Commissioner Tait (mimeo.) 4.

11 The following is a partial list of recent references to the *Grand Union* decision in published public addresses by Commission members and members of its staff: by *Chairman Kintner* to the Milk Industry Foundation in Chicago, Nov. 3, 1960 (mimeo. pp. 6-7); to Grocery Manufacturers Representatives in New York, Oct. 10, 1960

incorporated, in advance of the decision, in the recently issued FTC Guides for Advertising Allowances and Other Merchandising Payments and Services.[12] There is no doubt that the Commission regards the principle to be of great importance.

## *Criticism of the* Grand Union *Decision*

The Commission has greatly increased its enforcement activity recently in the area of the Robinson-Patman Act. And both lawyers and businessmen are being admonished that full compliance is expected—on the ground, in the words of the Chairman, that "the basic concepts of the Act can be understood by any businessman who sincerely desires to comply with the legal and moral requirements of the Act." [13] Sudden enlargement of the prohibitions of the law to include among its provisions its "spirit," as well as its letter, however, may not entirely square with this philosophy, for the Commission seems to have assumed a kind of mobile power to amend the Act at will on both an *ad hoc* and an *ex post facto* basis. Irrespective of whether it has the right to do this, it would seem that the decision tends to reduce both certainty and fairness in the law—both of which attributes should be basic goals of the Commission, because they are essential to faithful compliance.

The decision invites confusion both on the policy level and on the level of statutory interpretation. Even especially skilled practitioners in the art of legal spiritualism will have difficulties in communing with the "spirit" of the Robinson-Patman Act. Many believe that the Act has two spirits in eternal conflict with each other—a spirit

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(mimeo. p. 9); to Minnesota Food Retailers Ass'n in St. Paul, Oct. 3, 1960 (mimeo. p. 7); to Nat'l Ass'n of Purchasing Agents, Oct. 14, 1960 (mimeo. pp. 10-11); to Fed'l Bar Ass'n, in Chicago, Sept. 16, 1960 (mimeo. p. 13); by *Commissioner Tait* to A. B. A. Antitrust Section in Washington, Aug. 29, 1960 (mimeo. pp. 6-7); by *Robert M. Parrish, Executive Director,* to Ill. State Bar Ass'n Antitrust Section in Chicago, Nov. 10, 1960 (mimeo. pp. 7-8); *William D. Dixon,* City-Wide Business Meeting, in Cincinnati, Sept. 28, 1960 (mimeo. pp. 10-12); *William R. Tincher, Associate Director Bureau of Litigation,* to Cleveland Food Brokers Ass'n, in Cleveland, Oct. 28, 1960 (mimeo. pp. 20-21); to Iowa Milk Dealers and Iowa Ice Cream Manufacturers Ass'ns in Okoboji, Iowa, Sept. 15, 1960 (mimeo. p. 16).

12 See Guide 16; *cf.* Address by Harry L. Shniderman "Collateral Discriminations under the Robinson-Patman Act, Sections 2(c), (d), & (e)" to A. B. A. Antitrust Section in Washington, Aug. 30, 1960 (mimeo. pp. 5-6).

13 Address to Grocery Manufacturers of America on Nov. 9, 1959.

of antitrust law and a spirit of public utility law.[14] The spirit of antitrust may not be in it at all. What kind of spirit will answer the call?

Moreover, the decision seems contrary to no less than three basic principles of statutory construction: (1) that the specific prevails over the general; (2) that a later enactment prevails over an earlier one; and (3) that the positive expression of one prohibition, while failing to express a second prohibition, negatives the second. After all, Congress did deal comprehensively, if not artfully, with the subject matter of the Robinson-Patman Act in 1936, 22 years after enactment of the FTC Act in 1914. It "occupied the field," so to speak, and if it left gaps, it, not the Commission, should make the corrections.

### *Historical Support for the* Grand Union *Decision*

There are, however, some elements in the history and structure of our basic antitrust statutes which provide a basis for the *Grand Union* decision. We are accustomed to a great deal of overlapping among the major antitrust statutes. Further, as to Section 5 of the FTC Act, we have become accustomed to an extremely large scope, with a meaning which has never been fixed, nor clear, nor necessarily fully consistent, and which is always changing.[15] Its 19-word prohibition, as amended in 1938, of "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce" constitutes the broadest of all substantive antitrust provisions, and may be the widest delegation of law-making power ever made by Congress.

In the early years after the original enactment of Section 5 in 1914, the provision was treated with somewhat literal emphasis on the word, "unfair." Although the Commission had always been in-

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14 See *Report of Attorney General's National Committee to Study the Antitrust Laws* (1955) 129-132; "Antitrust Policy in Distribution," 104 U. Pa. L. Rev. 185, at 187 and note 15 (1955); Address by Frederick M. Rowe, "Expectation vs. Accomplishment under the Robinson-Patman Act, 1936-1960: A Statement of the Issues," to A. B. A. Antitrust Section, in Washington, Aug. 30, 1960 (mimeo.), and citations therein. For recent over-all appraisals see Edwards, *The Price Discrimination Law* (1959), esp. Ch. 19; Stedman, "Twenty-four Years of the Robinson-Patman Act," 1960 U. of Wis. L. Rev. 197 (March 1960).

15 See Howrey, "Utilization by the FTC of Section 5 of the Federal Trade Commission Act as An Antitrust Law," 5 Antitrust Bulletin 161 (1960); see also discussion in Oppenheim, *Cases on Federal Antitrust Laws* (2d ed. 1959) 17-19.

tended to fill in the meaning of the section,[16] it was nevertheless at first assumed that there were built-in literal language limitations. "Unfair" meant sub-standard business behavior towards competitors, either in the sense of being "opposed to good morals," or as constituting a "dangerous tendency unduly to hinder competition or create monopoly," as the Supreme Court put it in the *Gratz* case in 1920.[17]

While part of the Commission's Section 5 jurisdiction from the beginning was of an "antitrust" nature, it was not assumed, by any means, that the statute covered all antitrust problems. The well-known early history of the Commission in 1924 concluded that the Act "covered only a part of the field to which the law of restraints and monopolies is applicable. It covered only acts of competition, not agreements or combinations limiting or putting an end to competition between the parties." [18] The same writer apparently did not even consider the possibility that Section 5 might overlap the special antitrust provisions as finally worked out in Sections 2, 3, 7 and 8 of the Clayton Act.

Moving almost with the slowness of a glacier, but with the same irresistible force,[19] Section 5, under the Commission's largely cautious administration, gradually came to encompass the entire set of substantive prohibitions of both the Sherman and the Clayton Acts. That is, the phrase, "unfair methods of competition" has come to include any method, act or practice which violates those Acts.[20] And while

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16 *FTC* v. *R. F. Keppel & Bros.*, 291 U. S. 304 (1934).

17 *FTC* v. *Gratz*, 253 U. S. 421, 427 (1920).

18 Henderson, *The Federal Trade Commission* (1924) 37.

19 *Cf.* Kaysen and Turner, *Antitrust Policy* (1959) 237, who state that "Little in the way of new law has come out of Section 5."

20 *FTC* v. *Cement Institute*, 334 U. S. 839 (1948) ended any possible argument that Section 5 could not be applied to matters directly covered by the Sherman Act. Such use of Section 5 had really been taken for granted ever since *FTC* v. *Beechnut Packing Co.*, 257 U. S. 441 (1922). Use of Section 5 in matters directly covered by the Clayton Act has a somewhat less convincing background, but nevertheless seems well-established by virtue of *Fashion Originator's Guild* v. *FTC*, 312 U. S. 457 (1940); *Times-Picayune* v. *United States*, 345 U. S. 594, 609 (1953); and *FTC* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 394 (1953). See generally Howrey, "Utilization by the FTC of Section 5 of the Federal Trade Commission Act as an Antitrust Law," 5 Antitrust Bulletin 161 (1960).

the courts have undoubted ultimate power to overturn the Commission's legal definitions, the Commission has been given much latitude in recent times.[21]

Total inclusion of the Sherman Act under Section 5 made good sense, because it made possible the addition of remedial, administrative process to the existing more formal judicial system of enforcement. Inclusion of the substance of the Clayton Act provisions never made very much sense, however, since those provisions have always been enforceable by the Commission directly under Section 11 of the Clayton Act. The only apparent reason for pleading Section 5 in a case covered by a Clayton Act provision seems to have come from the expedient fact that FTC Act orders became automatically final after time for appeal and carried a civil penalty for violation, whereas Clayton Act orders could be ignored with impunity until enforced by decree of a Court of Appeals. This disparity has now been removed by amendment to the Clayton Act.[22]

Further, it was early recognized that the FTC Act would prohibit "incipient" Sherman Act violations, and could operate in the Sherman Act area on a level lower than that established by Sherman Act standards. As pointed out by the Supreme Court in the 1948 *Cement Institute* case:

> ". . . individual conduct, or concerted conduct, which falls short of being a Sherman Act violation may as a matter of law constitute an 'unfair method of competition.' "[23]

I do not believe, however, that it was ever seriously considered that the FTC Act could or should operate to supplement the very specific Clayton Act provisions, until the unexpected dictum of the Supreme Court in *FTC* v. *Motion Picture Advertising Service Co.*, in 1953, where the Court said:

> "It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and

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[21] See Howrey, *op. cit. supra* at 170.

[22] *Id.* at 184.

[23] *FTC* v. *Cement Institute*, 333 U. S. 683, 708 (1948); see "Conspiracy and the Antitrust Laws," 44 Ill. L. Rev. 743, 750-751 (1950).

> the Clayton Act. . . . to stop in their incipiency acts and practices which, when full blown, would violate those acts. . . ." [24]

This dictum overlooked the discordant fact that the FTC Act could not at birth have been intended to supplement antitrust provisions of the Clayton Act, since the FTC Act was enacted over a month *before* the Clayton Act.[25] Moreover, the Clayton Act itself was supposed to supplement the Sherman Act and to halt in their "incipiency" specified practices which were believed likely to grow into Sherman Act problems. The Court's dictum thus seemed to give rise to an absurd doctrine of "incipiency squared." [26]

The Court's reference to the Clayton Act was quite unnecessary to the decision. And although unquestionably the progenitor of the *Grand Union* decision, the *Motion Picture Advertising* case as a matter of substance resembled the *Grand Union* problem only superficially. It is true that the *Motion Picture Advertising* case did involve a type of transaction—exclusive screening agreements made with theaters by a producer of advertising films—which fell technically outside the letter of Section 3 of the Clayton Act, but which could be regarded as within its spirit. But the Commission did not approach the problem as if it were a "quasi-Clayton Act" problem. Instead, it treated the case as involving what would be a full-blown Sherman Act type of restraint of trade, as any exclusive dealing agreement may be treated, where a sufficiently unreasonable effect on competition is present. There was no hint of the *Grand Union* theory in the Commission's opinion.[27] The hint came only later when the Supreme Court engaged in its creative writing on review.

The Commission is thus not the real inventor of the *Grand Union* idea. That responsibility belongs with the Court.

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[24] 344 U. S. 392, 394-95 (1953).

[25] The Federal Trade Commission Act became law on September 26, 1914, and the Clayton Act became law on October 15, 1914; Butler, "Federal Trade Commission Jurisdiction under the Incipiency Doctrine," *U. Mich. 1953 Summer Institute, Federal Antitrust Laws* 154, 164-171.

[26] See Butler, *op. cit. supra.*

[27] *Motion Picture Advertising Service Co., Inc.*, Dkt. 5498, 47 F. T. C. 378, 390-394 (1950).

### *Actual Use of the "Spirit" Test in Current Robinson-Patman Cases*

The *Grand Union* "spirit test" is involved in several other pending cases involving alleged customer inducement of allowances illegal under Section 2(d).[28] The Commission also evidently had a similar theory in mind in its complaint in the *Simplicity Pattern* case.[29] Count I of that complaint charged the respondent, a manufacturer of dress patterns, with a Section 5 violation in discriminating among some of its customers as to allowance of certain types of credit arrangements.[30] (Count II charged violations of Section 2(e) as to other practices, and a cease and desist order under that Count was sustained by the Supreme Court.) The Examiner, foreshadowing the *Grand Union* theory, called the Section 5 charge "analogous to a proceeding under Section 2(a)." [31] Applying the competitive effect test of 2(a), however, he went on to hold that no showing of the requisite injury had been made. This conclusion was not disturbed by the full Commission.[32]

Also, a Commission official recently suggested that although genuine consignment transactions are not sales, and therefore are outside

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[28] *Giant Food Shopping Center, Inc.*, Dkt. 6459, Initial Decision, ordering respondent to cease and desist March 28, 1960, CCH Trade Reg. Rep. par. 28,624; *Individualized Catalogues, Inc.*, Dkt. 7971 (Complaint, June 24, 1960); *R. H. Macy & Co.*, Dkt. 7869 (Complaint, April 19, 1960); *American News Co.*, Dkt. 7396, Initial Decision, ordering respondent to cease and desist, May 27, 1960, CCH Trade Reg. Rep. par. 28,811; *Fred Meyer, Inc.*, Dkt. 7492 (Complaint, May 15, 1959); *Foster Publishing Co.*, Dkt. 7698 (Complaint, Dec. 21, 1959); *J. Weingarten, Inc.*, Dkt. 7714 (Complaint, Jan. 5, 1959; *American Radiator & Standard Sanitary Corp.*, Dkt. 7835 (Complaint, March 21, 1960); *Benner Tea Co.*, Dkt. 7866 (Complaint, April 19, 1960). Further, see consent order based on Section 5 issued in *Longines-Wittnauer Watch Co.*, Dkt. 7117, CCH Trade Reg. Rep. par. 27,616 (Nov. 14, 1958); *Keystone Mfg. Co.*, Dkt. 7118, CCH Trade Reg. Rep. par. 27,877 (March 5, 1959); *Trifari, Krussman & Fischel, Inc.*, Dkt. 7119, CCH Trade Reg. Rep. par. 27,474 (Sept. 23, 1958), and *United Cigar-Whelan Stores Corp.*, Dkt. 6525, CCH Trade Reg. Rep. par. 26,137 (July 31, 1956). *Cf. Food Fair Stores, Inc.*, Dkt. 6458, Dismissed on other grounds, Sept. 27, 1957, CCH Trade Reg. Rep. par. 26,729. See generally Shniderman, *op. cit. supra* note 12.

[29] *FTC* v. *Simplicity Pattern Co.*, 360 U. S. 55 (1959), affirming in part and reversing in part, 258 F. 2d 673 (D. C. Cir. 1958).

[30] Dkt. 6221, 53 F. T. C. 771 (March 13, 1957).

[31] *Id.* at 774.

[32] 53 F. T. C. at 777.

the scope of Sections 2(d) and (e), such transactions nevertheless "might be construed as grounds for a Section 5, FTC Act violation. . . ." [33]

If this development were to occur, the same idea would apply to Section 2(a), whose prohibitions of price discrimination are also confined to sales transactions, as distinguished from agency, bailment, consignment or leasing arrangements.[34] Moreover, once a departure from the "sale" requirement is made, the Commission might be tempted to steer around the Act's limitation to transactions involving "commodities," and go after discriminations in the price of services. No doubt the inventiveness which always accompanies legal expediency of this sort will uncover other situations where the types of transactions covered by the Robinson-Patman Act might be extended through Section 5, unless the courts call a halt.

This approach in Robinson-Patman Act cases is substantially inconsistent with the approach which the Commission has been using when the shoe is on the other foot. In the case of *Henry Rosenfeld, Inc.*, in 1956,[35] the Commission held that the meeting competition defense of Section 2(b) is not available in a 2(d) case, although it is clearly available in a 2(e) case,[36] with the result that availability of the defense depends only upon the sheer accident of form. This approach was reaffirmed last year in the *Admiral Corp.* case,[37] and

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[33] Address by William R. Tincher, Assoc. Director, FTC Bureau of Litigation, to Iowa Milk Dealers and Iowa Ice Cream Manufacturers Ass'ns, Okoboji, Iowa, Sept. 15, 1960 (mimeo. p. 16).

[34] *General Shale Products Corp.* v. *Struck Construction Co.*, 132 F. 2d 425 (6th Cir. 1942), *cert. den.*, 318 U. S. 780 (1943), Section 2(a) does not apply to price of materials furnished under an overall construction contract; *United States* v. *United Shoe Machinery Co.*, 264 Fed. 138, 165 (E. D. Mo. 1920), old Section 2 not applicable to lease of machinery; *Fleetway, Inc.* v. *Public Service Interstate Transportation Co.*, 72 F. 2d 761, 763 (3d Cir. 1934), old Section 2 not applicable to rental of transportation equipment.

[35] Dkt. 6212, 52 F. T. C. 1535 (1956).

[36] *FTC* v. *Simplicity Pattern Co.*, 360 U. S. 55 (1959).

[37] Dkt. 7094, CCH Trade Reg. Rep. par. 28,083 (May 29, 1959). Since this paper was delivered, the Commission has re-examined and reaffirmed its holding that a Section 2(b) meeting competition defense is not available in a Section 2(d) case, *Exquisite Form Brassiere, Inc.*, Dkt. 6966 (released Nov. 16, 1960), though acknowledging its availability in Section 2(e) cases. In an opinion which adopts a strict construction approach, quite different from the liberal construction used in his *Grand*

it has also been sustained by a Court of Appeals in the *Washington Fish & Oyster* case as to Section 2(c), dealing with brokerage payments.[38] It would seem that every argument made by the Commission for applicability of Section 5 in the *Grand Union* case would apply against its decisions holding the meeting competition defense unavailable in Sections 2(c) and 2(d) cases. Surely the "spirit" of the law haunts Commission and respondent alike.

It might be argued that the same reasoning might also require the Commission to reverse its stand, recently approved by the Supreme Court in the appeal on Count II of the *Simplicity Pattern* case,[39] that the cost justification defense and the test of effect on competition are relevant only to Section 2(a) and are not relevant to Sections 2(c), (d) and (e). For there is no convincing basis for believing that these subsections should be governed by a different "spirit" from that of Section 2(a). If the Commission has the duty to widen the prohibitions of the law, it would seem to have an equal duty to temper its prohibitions in accordance with some consistent theory which is in tune with Congressional expressions. If the Commission is unwilling thus to balance its scales of justice, its new theory, already a debatable one, will have the added infirmity of apparent inconsistency and unfairness.

## *Current Use of the* Grand Union *Approach in Other Clayton Act Cases*

Unequivocal attempts by the Commission to use Section 5 to "supplement" the provisions of Sections 3, 7 and 8 of the Clayton Act in the *Grand Union* manner have as yet been relatively few in number.

Section 3, in prohibiting certain types of exclusive dealing and tying arrangements, deals with restraint of trade and basically overlaps traditional subject matter of the Sherman Act. Consequently,

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*Union* opinion, Commissioner Secrest holds that failure of Congress to put the necessary words in the express language of Section 2(b) is conclusive, quoting from the *Simplicity Pattern* opinion of the Supreme Court that "We cannot supply what Congress has studiously omitted." (Mimeo. p. 8.)

38 *FTC* v. *Washington Fish & Oyster Co.*, 271 F. 2d 39 (9th Cir. 1959); *cf. Henry Broch & Co.* v. *FTC*, 261 F. 2d 725 (7th Cir. 1958), *reversed*, 363 U. S. 166 (1960).

39 360 U. S. 55 (1959).

FTC action under Section 5 on various types of exclusive dealing problems may usually be viewed as simply carrying out or supplementing the Sherman Act.[40] As already indicated, this was the evident

However, a few Section 5 proceedings have appeared to involve some elements which may have been inspired by theories of supplementing Section 3. For example, in the *Ice Cream* cases,[41] now pending before the full Commission after an Initial Decision dismissing the Complaint, a violation of Section 5 was alleged in that ice cream cabinets and loans were allegedly furnished to dealers on the understanding of exclusive dealing, with resulting adverse competitive effect. In his Initial Decision, the Examiner noted that some of the practices were "parallel" to those covered by Section 3, but might fall outside the scope of that section because not technically "sales" or "leases," and he approved the propriety of this use of Section 5.[42] But he went on to hold that the allegations had not been proved, and that there was no showing of "substantial injury to competition." [43] Thus he preserved a very important distinction between using Section 5 to reach practices falling "technically" outside but parallel to the scope of Section 3, and any attempt to use Section 5 to create lower standards of proof of competitive effect.

Possible attempts to use lower standards were also repelled by the Commission in the *Shell Oil Co.*[44] and *Socony Mobil Oil Co.*[45] cases last year, dismissing for lack of proof of probable competitive injury

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40 See *FTC* v. *Curtis Publishing Co.*, 260 U. S. 568 (1923) and *FTC* v. *Sinclair Refining Co.*, 261 U. S. 463 (1923), in which charges under Section 3 were coupled with Section 5 charges. In both, the respondents prevailed on the Section 5 charges because the Court held that substantial lessening of competition had not been shown.
basis of the *Motion Picture Advertising* case.

41 *Carnation Co., The Borden Co., Beatrice Foods Co., National Dairy Products Corp., Pet Milk Co., Fairmont Foods Co., Arden Farms Co., Foremost Dairies, Inc.* and *H. P. Hood & Sons, Inc.*, Dkts. 6172-6179 and 6425, Initial Decision dismissing the Complaint, June 26, 1959.

42 *Id.* at 117 (mimeo.).

43 *Id.* at 128.

44 Dkt. 7044, Dismissal affirmed by Commission, Nov. 9, 1959, CCH Trade Reg. Rep. par. 28,357.

45 Dkt. 6915, Dismissal affirmed by Commission, April 11, 1960, CCH Trade Reg. Rep. par. 28,702.

cases attacking alleged exclusive dealing and tying arrangements under Section 5.

Section 7 of the Clayton Act presents a more difficult problem than Section 3. Among the limitations in the coverage of the section, as amended in 1950, are that the firm from whom an acquisition of stock or assets is made must, like the acquiring firm, be a "corporation." Also, both the acquiring and acquired firms must be "engaged in commerce." The temptation of the Commission to add to its Clayton Act charges a deployment of Section 5 to overcome these limitations has proved irresistible in a series of acquisition cases it has filed. In the *Foremost Dairies* case,[46] the Commission has used both Section 7 and Section 5 and has attacked, in the words of one of the respondent's briefs, "corporations engaged in commerce, corporations not engaged in commerce, and non-corporate concerns not engaged in commerce." [47]

A dismissal by the Examiner of the latter two elements, on motion before hearings, was reversed by the Commission in an interlocutory appeal. In a peremptory opinion, the Commission stated that "practices not technically within the scope of a specific section of the Clayton Act may nevertheless constitute a violation of Section 5 of the Federal Trade Commission Act." [48] The *Foremost* case is now pending for decision before the Examiner, the hearings having been concluded. Meanwhile, similar use of Section 5 is being attempted by the Commission in several other acquisition cases.[49] Although Commission counsel admit that there cannot be divestiture in a Section 5 acquisition proceeding,[50] they have urged nevertheless that a Section 5

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[46] Dkt. 6495.

[47] Respondent's Brief in Answer to Proposed Findings, etc., of Counsel Supporting the Complaint, p. 37.

[48] 52 F. T. C. 1480 (1956).

[49] *National Dairy Products Corp.*, Dkt. 6651 (Complaint, Oct. 16, 1956); *The Borden Co.*, Dkt. 6652 (Complaint, Oct. 16, 1956); *Beatrice Foods Co.*, Dkt. 6653 (Complaint, Oct. 16, 1956); *National Tea Co.*, Dkt. 7453 (Complaint, Mar. 26, 1959); *Kroger Co.*, Dkt. 7464 (Complaint, April 1, 1959).

[50] *Foremost Dairies, Inc.*, Dkt. 6495, Proposed Findings, Conclusions of Law and Order with Legal Memoranda Relating Thereto of Counsel Supporting the Complaint, p. 9. The admission as to remedy is based upon *FTC* v. *Eastman Kodak Co.*, 274 U. S. 619 (1927).

violation could be the basis for some kind of effective cease and desist order.[51]

It remains to be seen whether these attempted enlargements of Section 7 can prevail. The difference between a corporation engaged in interstate commerce, and an individual proprietorship not engaged in interstate commerce—to put the most contrasting examples—seems far more than merely "technical." The *Grand Union* case, even if sustained on appeal, would therefore not be a controlling precedent in these merger cases, which seek to go below minimum requirements of Section 7, rather than merely paralleling existing prohibitions, as in *Grand Union.*[52]

As for Section 8 of the Clayton Act, on interlocking directorates, there appears to be no present attempt at extension through Section 5. The "spirit" might move at any time, of course, possibly as to such things as "interlocking" management, pointed out by the Commission in a report in 1951 as outside the technical reach of Section 8.[53]

### *Counselling Under the* Grand Union *Theory*

Counselling in the face of this slippery Section 5 development is no doubt extremely difficult, as Commissioner Tait observed in his dissent in the *Grand Union* case. Indeed, until the courts have either rejected the theory or greatly qualified it, it would seem necessary to accompany advice on a number of important Clayton Act questions with an appropriate warning about the hovering ghostly presence of Section 5.

It does not follow, however, that no limitations are visible to guide appraisal of problems and to mark outer limits of legal risk. Two rather clear tests appear from the language and rationale of the *Grand Union* opinion. First, the practice in question must be one

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[51] *Ibid.* In an address on Nov. 10, 1960 to the A. B. A. Antitrust Section Southwest Regional Meeting, Houston, Tex., Chairman Kintner stated that "This method of reaching mergers outside the ambit of Section 7 has not been tested before the Commission and the courts, but even at this stage it is important to note that his device, if approved, could have a far-reaching impact on future antimerger enforcement." (Mimeo. p. 13.)

[52] It is noteworthy that Chairman Kintner evidently does not regard the *Grand Union* case to be controlling on this issue, *op. cit. supra* note 51.

[53] *Report of the FTC on Interlocking Directorates* (1951) 13-14.

which is closely similar to, and parallel to, one already expressly prohibited in the Clayton Act, but which falls outside the prohibition because of a merely technical deficiency. Second, and equally important, there must also be reliable evidence that Congress did not intend to leave the practice unprohibited, or did not intend to "countenance" it. Both tests must be met, for the Commission has not claimed a right either to prohibit practices which are like those covered in the Clayton Act but of a lower order of magnitude or significance, nor has it asserted any right to prohibit anything which Congress intended to tolerate.

Adopting these two tests as guides, if the *Grand Union* decision is sustained by the courts, we may expect to find it applied to such things as agency or bailment transactions, and service transactions, where price discrimination or exclusive dealing practices of the type covered by the Clayton Act are present.[54] Similarly, if there were some kind of corporate acquisition which fell outside the meaning of the words, "stock," or "assets," as used in Section 7, we might expect use of Section 5, although no good example of this presently appears. Section 5 would be available to cure "technical" and formal deficiencies of this type.

But, it seems very clear that the *Grand Union* rationale does not attempt to create lower qualitative standards than those prescribed by Congress for the Clayton Act. The Commission is not attempting, and could not reasonably attempt, to reduce the already low *competitive effect* tests of the Clayton Act. As to these tests, Congress has set a qualitative minimum.

It also seems to me that Congress has set a minimum in refraining from applying Section 7 to non-corporate acquisitions and to acquisitions of firms not engaged in commerce. Although this minimum standard is indeed rough-hewn, it does effectuate a cut-off as to the relative significance of acquisitions with which the statute is to be concerned. Consequently, the approach being attempted in the *Fore-*

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[54] Applicability of Section 5 to exclusive contracts outside Section 3 because of bailment or agency was sustained in *FTC* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 397 (1953), but not on any theory of "paralleling" or rounding out Section 3. Rather, this decision rested expressly on the theory that the "Sherman Act is involved," where "the crucial fact is the impact of the particular practice on competition, not the label that it carries." (*Ibid.*)

*most Dairies* and similar merger cases would seem more extreme than, and unauthorized by, the *Grand Union* case.[55]

Finally, it is beyond any question, of course, that the Commission has no license to illegalize anything which Congress has expressly and affirmatively authorized, such as cost justification, meeting competition in price and services, and acquisition of stock for investment purposes. In fact, as suggested above, the *Grand Union* case is actually a challenge to the Commission to reverse its previous strict refusals to accept the meeting competition and cost justification defenses, and the test of effect on competition, in cases involving subsections 2(c), (d), and (e) of the Robinson-Patman Act.

Regardless of whether the Commission reverses its field, the limits described above, as to the probable application of the *Grand Union* theory to prohibit practices falling outside the terms of the Clayton Act, would seem reasonable guides, unless or until the courts hold differently. At least, they are as reliable as most of the guides with which antitrust counselors, and their often mystified clients, have had to learn to live.

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55 See note 51 *supra*.

# OBSERVATIONS ON THE TRIAL OF AN ANTITRUST CASE

by

EARL A. JINKINSON*

On the way here, Mrs. Jinkinson asked me if I was nervous in appearing before such a distinguished group and I replied: "Yes and No. Yes, because every lawyer present knows more about the subject matter than I do—and No because I address more lawyers than this every day in the case presently on trial at South Bend." This present trial is probably the "smallest-big" case I have ever tried. It involves price fixing on retail gasoline in South Bend, Roseland, and Mishawaka, Indiana (indeed by no means the entire geographical territory of South Bend), covering a period from April 15 to May 1, 1957; nevertheless more than 50 lawyers, representing 13 corporations have appeared.

As a matter of fact, if any lawyer here wants to participate in the trial of an antitrust case, get a chair, any kind will do, and come to South Bend and sit at any of the numerous tables the defendants have set up. It won't be necessary to announce whom you are representing, if anyone—no one will know the difference.

I understand the defendants never call a group meeting by announcing a conference, they merely say "It's Town-Hall To-nite."

The other day a bit of evidence was introduced against the Site Oil Company and Judge Luther M. Swygert turned to Site counsel and said: "Mr. Shifrin, do you object?"—no reply—again Judge Swygert said: "I say, Mr. Shifrin, do you object?" Finally a weak voice said: "Sorry Judge, Mr. Shifrin has gone for the day—I'm merely sitting in his seat."

Within the first hour and a half after starting to take testimony, we had the following situation: (1) Argument in support of a motion to dismiss a corporate defendant because of a variance between the proof and the allegation of the indictment in that the corporation was

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ED. NOTE: While not within the subject matter of the program, Mr. Jinkinson delivered this speech as the "after dinner" speaker and kindly consented to its publication herein.

indicted as being organized in the State of Illinois when in truth and fact it was a Kansas corporation; (2) a witness was asked to step aside until the Government and defense counsel could argue the law as to the admissibility of a document the witness had written, and (3) a witness was asked to step aside until it could be determined from the record and argument if the cross examination was outside the scope of the direct examination. All this prompted me to conclude that Judge Swygert really didn't need his obvious thorough knowledge of the law or his great personal integrity, but rather needed a refresher course on "Roberts Rules of Order."

Seriously, I would not like to leave the impression that Judge Swygert was not presiding in any fashion other than his usual fair, impartial and outstanding judicial manner.

As a Government antitrust trial lawyer, I hope I will not be speaking against my own interest in making these remarks on the trial of antitrust cases. Looking at you I am convinced that most of you either have been, are now, or joyously hope to be, at some future time, my opponent in the trial of these cases. I wish each and every one of you the good fortune to be retained to represent prosperous (and sufficiently frightened) clients who have had the misfortune to be charged with violating the antitrust laws. That, however, is as far as my good wishes will go. I hope that nothing I may say here will help you prevail against the Government in any case in which I happen to be representing the Government. On the other hand, I hope my remarks will assist you in expediting the disposition of antitrust cases in which you may be counsel. I hope also that my remarks may supply a little balance and perspective on the subject of the so-called difficulty and complexity of the trial of antitrust cases.

I suspect that many of you are convinced that there is something almost awe-inspiring about the size and complexity of these cases. I say that because in recent years I have noticed a marked tendency on the part of many judges, lawyers, and laymen alike, to almost visibly shudder at even the thought of the trial of an antitrust case. Somehow or other the notion has become deeply ingrained from some sources that these cases are huge, unwieldy, time-consuming proceedings which harass and burden the courts and clog their dockets; that there is an almost mystic quality to the complexities of trying them.

I want to say a few words about this all too prevalent notion about these cases, and what the *significance* of this idea is to antitrust enforcement.

It has been either my good fortune or my misfortune to have been associated with some of the cases which are regarded as being "big." The *A. & P.* case which was tried in Danville; the *Kansas City Star* case tried in Kansas City; and more recently, the *Packers' Consent Decree* case which was tried in Chicago. I have tried a good many besides these, and in addition, have participated in or directed the prosecution of scores of other antitrust cases which never went to trial because the defendants in the criminal cases decided to enter *nolo* or guilty pleas and those in civil cases entered into consent decrees. I'm sorry to say that I've also seen a few cases lost in the pleading stage.

The significant thing about the cases that went to trial was not that they took a considerable number of days to try; that they involved numerous documents and witnesses, or that they sometimes involved complex legal and factual issues. The significant thing about them was their vital importance in helping to maintain a competitive economy in this country and in checking the spread of monopolistic practices. Bear in mind that if it were not for cases such as these which have been brought under the antitrust laws there would be no legal barriers to the uninhibited spread of restraints of trade and monopoly. Thus, the time the courts spend on these cases is a public investment. As such it returns rich dividends in the form of a healthier economy.

The Supreme Court has frequently stressed the great purpose of these laws. Thus, it said recently (*Northern Pacific Railway Co. et al.* v. *United States,* 356 U. S. 1, 4 (1958)):

> "The Sherman Act was designed to be a comprehensive charter of economic liberty."

Time and again the Supreme Court has returned to this same basic thesis in its references to the aims underlying the Sherman antitrust laws. Thus, the court has said in *Standard Sanitary Manufacturing Company* v. *United States,* 226 U. S. 20, 49 (1912), that the law is:

> ". . . a limitation of rights, rights which may be pushed to evil consequences and therefore restrained."

and has said in *United States* v. *American Linseed Oil Company et al.*, 262 U. S. 371, 388 (1923) that the act was designed:

> " . . . to secure equality of opportunity."

Let me illustrate the practical application of these laws by reference to what our courts have said about specific restraints of trade and monopoly practices which were involved in the so-called "big" cases referred to earlier. I use these cases in part because I am familiar with them, and in part because they involve trade practices typical of those which the antitrust laws were designed to deal with. I refer to only two of them since the *Packer's Consent Case* is still pending.

In the *A. & P.* case, the Seventh Circuit, in unanimously confirming the conviction of defendants on charges of violating Sections 1 and 2 of the Sherman Act, made this statement regarding the evidence (*United States* v. *New York Great Atlantic & Pacific Tea Co.*, 173 F. 2d 79, 83 (C. A. 7, 1949):

> "One cannot escape the conclusion on the very substantial evidence here, as one follows the devious manipulations of A. & P., to get price advantages, that it succeeded in obtaining preferential discounts not by force of its large purchasing power and the buying advantage which goes therewith, but through its abuse of that power by the threats to boycott suppliers and place them on its individual blacklist, and by threats to go into the manufacturing and processing business itself, since it already possessed a considerable establishment and experience that would enable it to get quickly and successfully into such business if a recalcitrant supplier, processor, or manufacturer did not yield. The *A. & P.* organization was urged to keep secret whatever preferences it received. These predatory discounts and other preferences amounted to 22.15% of A. & P.'s total profits in 1939; 22.47% in 1940; and 24.59% in 1941.
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> "The influence of this ruthless force in the food buying field was also used to compel suppliers to discontinue practices in their business which might be detrimental to A. & P. For instance, some A. & P. suppliers were making store door deliveries to A. & P. competitors. Since A. & P. had to deliver to its own store doors from the warehouses it maintained, it was unable to get the full benefit of its warehousing policy if the suppliers con-

tinued the store door deliveries. A. & P. forced some manufacturers to 'widen the spread' between store door deliveries and warehouse deliveries and thus perpetuated its purchasing advantage."

I submit that in the face of facts such as these it is of minor importance how long it takes to try a case. The public interest in preserving competition, in maintaining freedom of opportunity is the over-riding, all important consideration.

In the *Kansas City Star* case, the Eighth Circuit, in sustaining the conviction in the district court of the defendants had this to say about one phase of the evidence (*The Kansas City Star Company* v. *United States,* 240 F. 2d 643, 654 (C. A. 8, 1957)):

> ". . . the jury was justified in concluding that The Star was an indispensable advertising medium for many advertisers and that it threatened advertisers with refusal to take their ads if they advertised in competitive publications. As an example, the manager of three theaters in Kansas City, Missouri, was told that his ad should be taken out of the Journal-Post and that if he didn't do so, his advertising would be left out of The Kansas City Star and Times. The manager of a store in Kansas City who had been advertising in the Journal-Post and who wanted to get his ads back into The Star was given to understand that it would be on an exclusive basis only."

These excerpts from opinions of the Court of Appeals and the Supreme Court illustrate graphically the type of economic misconduct with which the antitrust laws deal. The cases from which I have quoted are only two among the more than 1,500 which have been brought by the Department of Justice since the passage of the Sherman Act in 1890. These cases have run a broad gamut of offenses. They have involved *per se* price fixing, boycotts, misuse of patents, and a wide variety of monopolistic practices. Some of these cases have been massive ones, such as the *Standard Oil* and *Tobacco Trust* cases, which have resulted in the fragmentation of huge monopoly structures into many smaller competing units. Others have involved far more localized offenses. But it is cases such as these—the "big" ones and the "small" ones—which in large measure are responsible for giving the American economy its distinct coloration, variety, and vitality.

Section 4 of the Sherman Act invests the district courts of the United States with equitable jurisdiction to "prevent and restrain violations" of the Act. On the criminal side, jurisdiction is again, of course, in the United States district courts, thus all of the 1,500 and more criminal and civil antitrust cases which I referred to as having been instituted by the Department of Justice have been dealt with initially in these district courts. It is their statutory function to deal with patent infringement cases, tax cases, Lindbergh Act cases, and the multitude of other types of offenses over which the United States District Courts have been given original jurisdiction.

I have become increasingly suspicious about the hue and cry which has been raised during the last few years about the burden which these antitrust cases are said to impose on the courts and how these cases tend to clog the calendars of the courts.

What purpose is served by this kind of agitation when it might be said that every case that is brought in a United States district court is a "burden" on that court and, if the docket is a heavy one it adds to the docket's congestion.

Why the special emphasis on antitrust cases as being particularly burdensome to the courts? Is this a subtle and devious means of trying to influence the judicial function?

For example, is this kind of agitation intended to influence the judge before whom a Section 1404(a) motion is filed? Is it designed to encourage the judge in such cases to transfer the responsibility for handling the case to another judge in another district? The discretion of the court in acting on a motion to transfer is, according to Supreme Court decisions, virtually non-reviewable. If a court's mind has been conditioned to consider an antitrust case before him as an unreasonable burden, may not this form of brainwashing affect the ruling he makes on one of these forum non-conveniens motions?

We can, of course, sympathize with a court which is faced with the responsibility of trying any major case whether it be in the field of patents, taxes, antitrust, or any other area. Nevertheless, the hazards lurking in the path of the court to which an antitrust case has been assigned have been grossly exaggerated.

Occasionally there has been a giant antitrust case which has tied up the time of the court for a long period. The same holds true of cases in many other fields of the law. These cases are, however, even in the antitrust field, relatively rare. If I haven't already sufficiently

bored you with this paper, let me do so now by citing some statistics. In the United States district court located in Chicago, for example, there have been but two so-called truly "giant" antitrust cases brought by the Antitrust Division in the last twenty years. One was the *DuPont-General Motors* case, with which I am sure all of you are familiar. The trial of this case took a total of 103 days. The Government took 18 days to put on its case in chief, its rebuttal, and to make its closing argument. The defendants took the remaining 85 days. Here I am counting as a full trial day every day in which any proceedings were had during the course of the trial. Actually, in this case, most of the trial days were in fact only half days. But, I do not believe anyone can seriously contend that a case of this magnitude and economic significance can be attacked as being a "burden" on the court or as "clogging its docket."

The second really "big" antitrust case, in terms of trial time as well as economic significance, in Chicago in the last twenty years was the *packers' consent decree* proceeding which consumed 62 trial days. Nevertheless, here a very energetic and hard-working trial judge not only tried this case, but in addition handled most of the proceedings involved in his regular docket of cases at the same time.

The great bulk of antitrust cases which are filed in the average district court take a relatively short time to try if indeed they come to trial at all. Thus, during the twenty years from 1940 to 1960, the Antitrust Division had a total of 72 cases in the United States district court in Chicago, of which 64 were filed here initially, with the remaining eight being transferred here from other districts. As at least six judges were sitting in this court during most of this period of time, this means that an average of less than one antitrust case per judge, per year, was assigned.

Sixty-nine of the 72 cases have been disposed of here, including two which have gone through the trial stage and are now awaiting judgment.

Let me point out that out of these 69 disposed of cases, only 16, or less than one out of four, went to trial. The remainder were disposed of on *nolo* or guilty pleas, consent decrees, or were dismissed on the pleadings without ever going to trial. Thus, in twenty years in the second busiest federal district in the United States there has been on the average, less than one trial per year of antitrust cases instituted by the Government.

Of these sixteen cases which went to trial, eleven of them were tried in ten days or less, and of these, two took only three trial days; two more taking four and five days, respectively, and thus, only five antitrust cases in this twenty-year period took more than ten days to try, and these took 13, 17, 30, 62, and 104 trial days, respectively. Twenty years of the Government's prosecution of antitrust cases which were filed in or transferred to Chicago have used a grand total of only 304 trial days. Even here, 165 days were taken on the two "big" cases I referred to, with the remaining 14 cases being tried in a total of 139 days.

The experience in Chicago is, I think, typical of trial experience elsewhere in the United States. A tiny fraction of the antitrust cases brought by the Government take any considerable length of time to try. A relatively small proportion of all antitrust cases filed by the Government go to trial—only one out of four or five. Most of these are disposed of with trials which seldom go over two weeks.

I submit, this is a remarkable record considering the importance of these cases in our economy and the fact that usually it is the "tough" case which goes to trial.

Now let me look at these cases which go to trial and discuss the ways and means which have been developed over the years to expedite the progress of the trial, and thereby save time of both court and counsel on both sides.

The Federal Rules of Civil Procedure and of Criminal Procedure apply, of course, to these cases as they do to all other cases brought in the federal courts.

Because of the extensive use of pre-trial discovery procedures, by the time a civil antitrust case approaches the trial date, there is little, if any, of the Government's evidence which has not been laid bare to the defendants.

I am constantly being amazed at the ingenuity, indeed the "outer-space" imagination, displayed by defense counsel in their probing (through interrogatories, motions for discovery, motions for bills of particulars, pre-trial conferences, etc.), for every scrap of information in the Government's possession. We have even been asked in interrogatories, to supply not only the name and address of each prospective Government witness, but also to specify precisely what the witness' testimony is to be. This is what might be called "Operation Crystal Ball." Recently, in a criminal case to be tried not too far from here,

the defendants sought a pre-trial order which would require the Government to turn over to them, a month prior to trial, the name of each witness who would be put on the stand, the order of his appearance, and a copy of each exhibit which would be offered, together with the order of offering. Then the defendants asked that the Government be barred from making any change in the order of witnesses to be used or documents to be offered, unless the Government could first show good cause to the court. This is what might be called "Operation Hamstring." Fortunately, however, the court did not buy these particular proposals.

I must concede that the Government, of course, does some probing of its own through the use of pre-trial discovery procedures in civil cases. Here, however, the Government is in the main seeking evidence which is available nowhere other than in the files of the defendants.

Regardless of the extent to which the defendants gain pre-trial access to the minutia of the Government's evidence and the care with which that evidence has been accumulated, this in and of itself may not greatly expedite the trial of a case unless further important steps are taken.

Let me illustrate. In the recent *packers' consent decree* case, both the Government and the defendants were relying heavily on statistical data. These statistics were drawn from a large number of sources. There is no question but that "orthodox" trial methods would have tied-up the court's time for a long time on the mere mechanics of proving source and authenticity–time which would have absolutely no bearing on the substantive issues involved in the case.

The solution of this problem was reached in pre-trial conferences with the court. The situation in this case was unusual in that the defendants, through seeking the modification of the decree, were the moving parties and would occupy the starting position at the trial.

The attorneys representing the Government proceeded at this conference on the basic hypothesis that the defense attorneys were reputable, honorable persons who were also officers of the court. If, therefore, these attorneys gave us assurance that the statistical tables or charts which they wanted to offer were based on responsible sources (including their own company records) and were as accurate as good faith statistical work could make them, the Government as a first step would enter into a stipulation permitting these tables and charts to be offered without any further authentication. Two protec-

tive provisos were attached to this particular stipulation. First, any party other than the offering one could object to the admissibility of the document on the substantive grounds of materiality and relevancy. Second, any party other than the offering one could dispute, contradict, correct, or supplement any matter contained in any of these exhibits.

You may say it is wholly inconsistent to stipulate on one hand as to the authenticity of the document, and at the same time reserve the right to dispute, correct, or contradict any matter contained in the same document. The inconsistency, however, turns out to be more apparent than real. Although the stipulation covered several hundred petitioners' documents, there were in fact only two of these that the Government, during the course of the trial, had occasion to attack as to accuracy. And even here, this reflected in no way on the good faith of the attorneys offering the exhibits, but rather attacked the economic evaluation which had been given to certain underlying data.

The same stipulation applied as to over 200 exhibits, largely statistical, which the Government offered.

Broadly speaking, in this case the stipulation as to statistical material and certain other categories of documents, completely eliminated the need for proof of authenticity, relying instead on the good faith of the attorneys in vouching for the exhibit. We thereby saved literally weeks, and perhaps months, of the court's time, as well as that of attorneys in expediting and simplifying the course of the trial. An attorney, in offering an exhibit, had to do more than identify it and offer it in evidence.

As you know, many of our antitrust cases, particularly the civil ones, are largely documentary in character. In these cases, we attempt either through stipulations or by recourse to Rule 36 of the Civil Rules, to dispose of the question of authentication of these documents prior to trial. We have on the whole been very successful in using this procedure. When we are successful, we have frequently then taken the next step of organizing these exhibits prior to trial in approximately the sequence in which we intend to offer them. They are given trial exhibit numbers prior to trial, and multiple photostats are prepared. We then, just prior to the start of the trial, supply the court and defense counsel with sets of these pre-numbered exhibits. Defendants, of course, always retain the right to object to the exhibits on

the grounds of relevancy or materiality. But, the stipulations or admissions under Rule 36, as to the authenticity of the documents, saves an enormous amount of trial time.

Speaking as a trial attorney, I am in general temperamentally and tactically adverse to sweeping stipulations on facts. All too often it takes far more time for opposing counsel to reach an agreement on the phraseology of the stipulation as to facts, than it would take to introduce the evidence in the normal course of proceeding. There are, of course, many relatively narrow areas of fact where stipulations can readily be formulated which will save much time. This was done, for example, in the *packers' consent decree* case, where certain trade practices and economic conditions as to which the evidence was unmistakable were made the subject of stipulations which saved a great deal of trial time.

There is no magic formula which can be used to eliminate the time, sweat, and toil which are the traveling companions of every trial, whether of an antitrust case or of any other case. A lawyer-like approach to these trials does not mean a pettifogging insistence on dreary, time-consuming technicalities of procedural proof when these serve no useful purpose. Rather, it involves a broad gauge tri-party cooperative effort on the part of the court, Government counsel and defense counsel, to by-pass and shortcut procedural routine, so that all may come to grips speedily with the underlying substantive issues. To a large extent it has been the application of this approach which has made it possible for so many of these "big" and economically very important antitrust cases to be tried with so relatively little wasted time.

# ANTITRUST NEWSLETTER

## Supreme Court

Dkt. 55—*United States* v. *E. I. duPont de Nemours and Company,* 177 F. Supp. 1 (N. D. Ill., 1959), petition filed March 11, 1960. Probable jurisdiction noted May 23, 1960.

This action stems from the District Court's opinion regarding relief which, in turn, was necessitated by the mandate in the decision of the Supreme Court which adjudged duPont's acquisition and retention of 23% of General Motors common stock to be a violation of Section 7 of the Clayton Act (353 U. S. 586). The District Court, upon remand, held that duPont could continue to hold the General Motors stock provided that certain devices were imposed for the purpose of insulating such ownership from its natural and usual results.

In a case which it characterizes as "a landmark in the history and development of the antitrust laws," the Government argues that divestiture is the only remedy available once, as here, the acquisition has been held to be illegal or, in the alternative, that the insulating devices adopted by the District Court are inadequate.

Dkt. 65—*Brown Shoe Company* v. *United States,* 179 F. Supp. 721 (D. C. Mo.), appeal filed April 1, 1960, probable jurisdiction noted June 20, 1960.

The District Court held that the merger of the fourth largest shoe manufacturer in the United States with the largest family shoe chain retailer in the country, resulting in the manufacturer becoming the third largest, substantially lessened competition and tended to create a monopoly in the manufacture and retailing of men's, women's and children's shoes in the relevant geographic market and that such merger was in violation of Section 7 of the Clayton Act. Brown particularly challenges the Court's findings with respect to "lines of commerce," *viz.,* men's, women's and children's shoes, and "section of the country," *viz.,* cities of 10,000 or more and their immediate and contiguous surrounding area. Petitioner also alleges that the District Court

erred by failing to distinguish the appropriate lines of commerce with respect to shoe manufacturing as opposed to shoe retailing. In its motion to affirm, the Government takes the position that no substantial questions of law are presented by Judge Weber's opinion.

Dkt. 203—*Eli Lily and Company* v. *Sav-On-Drugs, Inc.,* 31 N. J. 591, 158 A. 2d 528 (1960), appeal filed June 30, 1960, probable jurisdiction noted and case transferred to summary calendar October 17, 1960.

From the New Jersey Supreme Court's *per curiam* affirmance of the Superior Court's dismissal (57 Super. 291, 154 A. 2d 650) of its action for injunctive relief under the Fair Trade Law, Lily appeals. The dismissal was premised on a finding that Lily was "doing business" in New Jersey and, since it had not registered as a foreign corporation, was ineligible to sue for the enforcement of a contract in New Jersey.

Lily contends that Article I, Section 8 of the United States Constitution forbids the application of state qualification statutes to foreign corporations engaged in interstate commerce; that even if it were "doing business" in New Jersey, no state may constitutionally require a foreign corporation to secure its approval to transact interstate business. Furthermore, even if the constitutionality of the New Jersey qualification statute be upheld, the no-suit sanction also offends the commerce clause.

## Other Court Decisions

*Atlantic Heel Co., Inc.* v. *Allied Heel Co., Inc., et al.* (C. A. 1st Cir., Dec. 15, 1960).

A treble damage action complaint alleged a conspiracy to destroy a competitor by means "so inimical to the free and full flow of interstate trade" as to constitute a *per se* violation of Section 1 of the Sherman Act. It fell, the First Circuit rules, within the rationale of *Klor's Inc.,* and, therefore, no allegations of further facts showing the basis of public harm and consequent unreasonableness of the restraint were necessary. The means alleged included wrongful taking of trade secrets, proselytizing of key employees, breach of fiduciary relationship, false statements, interference with sources of supply, institution of suit in bad faith, and disturbing of employees.

*Huntington Imported Cars, Inc.* v. *Standard-Triumph Motor Co., Inc., et al.* (U. S. D. C. E. D. N. Y., Dec. 1, 1960).

A court had no jurisdiction over an individual defendant, in a private antitrust action, who was served outside the court's jurisdiction. The defendant had filed an affidavit (not denied by plaintiff) that he had never been within the jurisdiction nor had he conducted any business there.

*Riss & Co., Inc.* v. *Association of American Railroads, et al.* (U. S. D. C. D. C., Dec. 9, 1960).

Railroads failed to establish that they were damaged where they merely offered to prove that a trucking company agreed with other motor carriers to charge the same rate; that the trucker transported a specific amount of tonnage pursuant to such rates; and that because of an "equitable" division policy of the Defense Department, they would have received the specific individual shipments that the Company had transported, but for the agreement between the Company and the other motor carriers to fix rates. On the basis of such evidence, a jury could only speculate as to the impact of the claimed diversion on the railroads. They could not merely prove what traffic the trucking company carried in order to recover damages.

*Tinnerman Products, Inc.* v. *George K. Garrett Co., Inc.* (U. S. D. C. E. D. Pa., June 27, 1960).

Since the patentee had executed two licenses with third parties, the same including price fixing provisions, the patent was held unenforceable.

*Joseph Carroll, et al.* v. *American Federation of Musicians of the United States and Canada, et al.* (U. S. D. C. S. D. N. Y., Oct. 19, 1960).

A temporary injunction has been denied to a group of orchestra leaders and an association of orchestra leaders who failed to show that new "price lists," alleged to be a Sherman Act violation of the defendants' musicians unions would cause irreparable damage. They had been Union members and had "lived with" comparable lists for at least 15 years.

*Budget Dress Corp.* v. *International Ladies' Garment Workers' Union* (U. S. D. C. S. D. N. Y., Dec. 23, 1960).

A motion to strike answers which gave the court historical data was denied because such material has become customary in antitrust actions and found to be of great value in the handling of antitrust cases.

*Broadcasters, Inc., et al.* v. *Morristown Broadcasting Corp., et al.* (U. S. D. C. D. N. J., July 25, 1960).

A claim for damages under Section 4 of the Clayton Act for injury to business or property could not be sustained where a plaintiff had merely filed an application for permission to conduct a radio station; at this point, no business or property existed, but merely an anticipation of one.

Merely filing an application for a radio broadcasting license, in competition with plaintiff's application and with a consequent delay in processing of his application by the Federal Communications Commission, would not be restraint of trade in violation of the antitrust laws.

*Lou Poller* v. *Columbia Broadcasting System, Inc., et al.* (C. A. D. C. Cir., Nov. 10, 1960).

No "monopoly" in the statutory sense results from network unilateral cancellation clauses, nor from the fact that, because a particular station can broadcast only one program at a time, and only one program at a time can be received, there is a "vertical monopolization" of every TV station in the nation which receives and transmits the program; this is a result of physical laws. "Option time" and "must buy" rules were not in issue.

## Department of Justice Activity

*U. S.* v. *A. B. Dick Co.* (U. S. D. C. N. E. D. Ohio, Order, Sept. 13, 1960).

Attorney General William P. Rogers announced the entry of an Order by Judge Girard E. Kalbfleisch in the United States District Court in Cleveland, Ohio, terminating a civil contempt action against the A. B. Dick Company of Chicago, Illinois.

The Government's petition for the contempt order charged that A. B. Dick, beginning in 1952, engaged in activities in alleged violation of certain provisions of a judgment entered on March 25, 1948 in a civil antitrust proceeding relating to the manufacture and distribution of stencil duplicating products.

The Court's Order modifies in two respects the 1948 judgment and in a letter addressed to the Department of Justice—and also filed with the court—A. B. Dick has agreed to amend its current distributor and

dealer contracts so as to remedy the practices complained of in the petition.

As amended, the judgment enjoins A. B. Dick until 1968 from acquiring any stock or assets of any company engaged in the manufacture or sale of stencil duplicating products. Certain exemptions to this prohibition permit acquisitions where the franchise is terminated by the death of the distributor and the heirs of such distributors offer to sell to A. B. Dick or where the distributor terminates the franchise with A. B. Dick and offers to sell.

The second amendment to the judgment requires that until March 25, 1965, if A. B. Dick terminates its franchise with any distributor it must continue to sell upon request stencil duplicating products to that distributor as a dealer for resale.

In the letter filed with the Court A. B. Dick agrees to amend, within 90 days from August 1, 1960, its distributor contracts. Some of the important amendments to these contracts are: (1) the cancellation date of a franchise must be extended from 30 days to 90 days; (2) during the 90-day termination period A. B. Dick is required to fill the distributor's normal orders and, when the distributor can show the need for amounts above his normal orders, A. B. Dick must fill such orders; and (3) A. B. Dick has to delete from these contracts the provisions which require that there shall be mutual cooperation and consultation between representatives of A. B. Dick and the distributor for the development of profitable sales volume within the distributor's territory.

Also as agreed to, beginning in 1961, A. B. Dick must inform its distributors fully of the methods used in arriving at their sales quotas. In the event A. B. Dick adopts a different method of computing such quotas, it must continue to determine them on a uniform basis for all of its distributors, and further, it must supply the information necessary to enable any distributor to verify its own quota calculation. Finally, the sales quota assigned by A. B. Dick to each distributor for the sale of impression paper cannot be used to judge a distributor's over-all performance with respect to the sale of stencil duplicating products.

*U. S.* v. *Cornell-Dubilier Electric Corp., et al.* (U. S. D. C. E. D. Pa., Indicts., Sept. 15, 1960).

Attorney General William P. Rogers announced that a Federal Grand Jury sitting in Philadelphia, Pennsylvania, returned an indict-

ment charging six manufacturers of electrical equipment with violations of the Sherman Antitrust Act in connection with the sale of electrical devices called "power capacitors." These devices, which are used to correct voltage fluctuations and thereby assist in the efficient transmission and distribution of electrical energy, are sold by the defendants to electric utility companies, other electrical manufacturers, industrial companies, and to governmental agencies. Total yearly sales of power capacitors by the defendants amount to approximately $24,000,000.

Named as defendants in the indictment were: Cornell-Dubilier Electric Corporation, South Plainfield, New Jersey, General Electric Company, New York, New York, McGraw-Edison Company, Elgin, Illinois, Ohio Brass Company, Mansfield, Ohio, Sangamo Electric Company, Springfield, Illinois and Westinghouse Electric Corporation, Pittsburgh, Pennsylvania.

Defendants are charged with conspiring, at least as early as 1958, and continuing thereafter until about October 1959, to restrain commerce in power capacitors by fixing and maintaining prices, terms and conditions for the sale of such products, and by quoting to electric utilities and public agencies, in submitting bids and quotations to such customers, only the prices for power capacitors as agreed upon.

The indictment sets forth some of the actions taken by the defendants to carry out the alleged conspiracy. For example, the indictment describes various meetings held by defendants, including meetings in Chicago, Illinois; Pittsburgh, Pennsylvania; and Atlantic City, New Jersey, at which they agreed to increase prices for power capacitors. Further, it is alleged that representatives of the defendants have discussed and agreed upon discounts from the published prices to be allowed specific customers; discussed and agreed upon rules to be used in pricing power capacitors; and discussed and agreed upon prices for new types of power capacitors before they published such prices or marketed such products.

As the result of the alleged conspiracy, the indictment charges, prices of power capacitors throughout the United States have been raised, fixed, and maintained at high and artificial levels; price competition in the sale of power capacitors has been restrained and suppressed; and purchasers of such products have been deprived of the benefits of free competition.

*U. S.* v. *Durable Building Materials Council, Inc., et al.* (U. S. D. C. W. D. Tenn., Indicts., Sept. 19, 1960).

Attorney General William P. Rogers announced that a federal grand jury in Memphis, Tennessee returned two indictments against a trade association and eight building material dealers on charges of violating the Sherman Antitrust Act in connection with the sale and distribution of cement and ready mixed concrete. According to the indictments, annual sales of cement and ready mixed concrete affected by the charged violations total approximately $8,700,000 in the Memphis area.

Named as defendants in the cement indictment were: Durable Building Materials Council, Inc., Fischer Lime & Cement Company, Fay Realty Company, Crump Lime and Cement Co., Inc., Standard Builders Supplies, Inc., John A. Denie's Sons Company, Fant & Anderson Co. (a partnership), and Memphis Lime & Cement Company (a partnership).

This indictment charged that defendants, since at least 1955, conspired to fix prices for the sale of cement; to quote identical prices to the City of Memphis, Memphis City Schools, Shelby County Board of Education, and other governmental agencies; to publish and circulate through defendant Council cement price lists; and to establish a bid registration system in the Council on bids to public awarding authorities.

The following companies were named as defendants in the ready mixed concrete indictment: Fischer Lime & Cement Company, John A. Denie's Sons Company, and V. E. Schevenell Construction Co., Inc.

These defendants were charged with conspiring, since at least 1958, to fix, stabilize and control prices for the sale and distribution of ready mixed concrete in the Memphis area.

According to the indictments, the effects of these practices have been to increase the price of cement and ready mixed concrete and to eliminate competition among building material dealers in the Memphis area in the sale and distribution of these products.

Two companion civil actions were filed against the same defendants alleging identical violations of the Sherman Act. Relief is sought to require the dealers to issue new prices based upon cost, independently arrived at, and to prevent communications among defendants with respect to future bids to public awarding authorities and other

purchasers. In addition, one complaint seeks the dissolution of the Council.

*U. S.* v. *American Radiator and Standard Sanitary Corp.* (U. S. D. C. W. D. Pa., Consent Judgment, Sept. 20, 1960).

Attorney General William P. Rogers announced the entry in the Federal District Court at Pittsburgh, Pennsylvania, of a consent judgment successfully terminating the Government's antitrust action against American Radiator & Standard Sanitary Corporation.

The Government's complaint, which was filed on March 30, 1956, charged that the acquisition in January 1956 by American-Standard of Mullins Manufacturing Corporation of Salem, Ohio, violated Section 7 of the Clayton antitrust law. According to the complaint, American-Standard was, in 1955, the largest manufacturer of kitchen sinks and bathtubs in the United States, and sold these products and others, including steel kitchen cabinets and plumbing fittings throughout the country. Mullins was the largest manufacturer of steel kitchen sinks and steel kitchen cabinets in the United States and sold its major product line, "Youngstown Kitchens," and other products, including plumbing fittings, throughout the nation.

The complaint alleged that the acquisition would eliminate actual and potential competition between American-Standard and Mullins in the production and sale of kitchen sinks, steel kitchen cabinets and bathtubs, and would enhance American-Standard's competitive advantage over other manufacturers of these products. The complaint also charged that, as a result of the acquisition, competition generally in the production and sale of kitchen sinks, steel kitchen cabinets and bathtubs would be reduced, and industry-wide concentration in the manufacture and sale of these products would be increased.

The complaint asked the Court to order American-Standard to divest itself of the stock or assets it had acquired from Mullins.

The final judgment entered requires American-Standard to divest itself of the business and plants acquired from Mullins and presently known as the Youngstown Kitchens Division of American-Standard, which encompasses the "Youngstown Kitchens" business at Warren, Ohio, and the contract stamping business carried on at Salem, Ohio. The divestiture is to include all assets or improvements which may have been added by American-Standard and which are now being used in the business.

Any proposal for the carrying out of this divestiture is subject to the approval of the Court and must have the objective of maintaining "Youngstown" as an operating factor in competition. The judgment orders American-Standard to make a bona fide effort to divest itself of "Youngstown" by means of sale, and for this purpose to make known the availability of "Youngstown" for sale and to promote an expeditious sale. The sale is to be at a price and upon terms which are acceptable to the Court. The Government or American-Standard may apply to the Court for approval of any offer to purchase the business.

The judgment further directs American-Standard, until the time of divestiture or further order of the Court, to continue the operations of the Salem and Warren, Ohio, properties as operating factors in competition.

American-Standard is prohibited by the final judgment, for a period of five years, from acquiring any interest in any business or plant engaged in the United States in the manufacture, distribution or sale of plumbing fixtures, plumbing fittings, or steel kitchen cabinets unless the Government interposes no objections to any such proposed acquisition or the Court grants permission after an affirmative showing by American-Standard to the satisfaction of the Court that the acquisition would not substantially lessen competition or tend to create a monopoly in respect of plumbing fixtures, plumbing fittings, or steel kitchen cabinets.

*U. S.* v. *The General Fireproofing Co., et al.* (U. S. D. C. W. D. N. Y., Indicts., Dec. 7, 1960).

Attorney General William P. Rogers announced the return of three indictments by a federal grand jury at Buffalo, New York, charging manufacturers with conspiracy to fix prices or eliminate competition in the multi-million dollar metal office furniture industry in violation of the Sherman Antitrust Act.

The first indictment charges ten leading manufacturers of metal office furniture with conspiracy to stabilize prices through illegal agreements to use a uniform zone delivered pricing system with artificial zone boundaries, and agreements to fix the consumer prices for metal desks, tables and filing cabinets.

The indictment named as defendants: The General Fireproofing Company, Youngstown, Ohio, Globe-Wernicke Company, Norwood, Ohio, Shaw-Walker Company, Muskegon, Michigan, Yawman and

Erbe Manufacturing Company, Inc., Rochester, New York, Art Metal, Incorporated, Jamestown, New York, Steelcase, Inc., Grand Rapids, Michigan, Sperry Rand Corporation, New York, New York, and All Steel Equipment, Inc., of Aurora, Illinois.

The Invincible Metal Furniture Company of Manitowoc, Wisconsin, and the Browne-Morse Company of Muskegon were named co-conspirators but not as defendants.

According to the indictment, metal furniture sales totaled approximately $210,000,000 in 1958 and the defendants and co-conspirators accounted for $114,000,000 of that total.

It was charged that the defendants made an illegal agreement to divide the United States into three selling zones, an Eastern zone, a Central-Southern zone and a Western zone.

Following the zone agreement, the defendants allegedly established consumer list prices for the Eastern zone and determined the prices for the other zones by agreement on identical percentage differentials.

The Government also charged the defendants and co-conspirators agreed to base any subsequent price changes on later understandings and to stabilize zone delivered prices by limiting the number of standard colors each manufacturer would furnish, and by making extra charges for other colors and for laminated plastic tops.

The indictment listed as effects of the conspiracy, suppression of price competition at the manufacturing, wholesale and retail levels in the sale and distribution of metal desks, tables and filing cabinets, while users of such furniture have been deprived of the benefits of free and open competition in purchasing such equipment.

The second indictment charged the Shaw-Walker Company and Sperry Rand with conspiracy to eliminate price competition and allocate between themselves the sale of fire resisting filing cabinets.

The two defendants were described as the largest manufacturers of fire resisting filing cabinets with sales totaling $7,000,000 in an industry of approximately $12,000,000.

It was alleged that the effect of the conspiracy was the fixing of resale prices for the articles by private agreement instead of free competition, thus preventing purchasers from buying at competitive prices, and depriving buyers of the free choice of their supplier.

The third indictment, which named Sperry Rand, charged a conspiracy with General Fireproofing, Steelcase, Inc., Art Metal, Incorpo-

rated, and Diebold, Inc., of Canton, Ohio, to eliminate competition in the sale of fire resisting filing cabinets.

The indictment charged the defendant and co-conspirators agreed not to compete with Sperry Rand in sales of fire resisting filing cabinets to the United States Government; not to compete with each other in sales of these products to purchasers other than the Government; to resell Sperry Rand products only at identical retail prices fixed by Sperry Rand and to require each dealer or retailer to agree not to resell at less than Sperry Rand's established prices.

According to the Government's charges, Sperry Rand, in order to effectuate the conspiracy, regularly investigated and policed dealers' sales prices and used fair trade agreements in the District of Columbia and in states where such agreements are not authorized by law.

Sperry Rand manufactures annually fire resisting filing cabinets and accessories valued at approximately $4,500,000, and the Government charged the conspiracy precluded the United States Government and other purchasers from buying such products at competitive prices from sellers of their choice.

*U. S.* v. *Paul Barnett, Inc., et al.* (U. S. D. C. S. D. Fla., Indict., Dec. 8, 1960).

Attorney General William P. Rogers announced the return at Miami, Florida, of an indictment charging seven leading Miami office supply dealers with violating the Sherman Antitrust Act by conspiring to fix prices in retail sales of office supplies totaling more than $3,500,000 annually.

The seven dealers, also named defendants in a companion civil antitrust suit, are: Paul Barnett, Inc., Central Stationers, Inc., Long Office Supply Company, Mr. Foster's Store, Inc., Seminole Paper & Printing Company, Inc., Skagseth-Bryant, Inc., and Atlantic Paper Company.

The indictment and the civil complaint charge that the price-fixing conspiracy began last April when the defendants agreed to eliminate quantity discounts except upon uniform conditions, to force other office supply dealers to adhere to the terms of the conspiracy by threat of economic reprisal, and by boycotting suppliers who refused to discontinue sales to office supply dealers who would not go along with the scheme.

In addition, the indictment charges that office supply dealers in Miami have suffered economic coercion as a result of the conspiracy, and have been eliminated or faced possible elimination as competitors in the sale of office supplies.

The indictment also charges boycotts or threats of boycotts against suppliers and manufacturers of office supplies.

The two government actions allege that the defendants account for more than half of the $7 million in retail office supply sales made annually in the Miami, Dade County, area.

If convicted under the indictment, the defendants can be fined up to $50,000, while the civil action seeks to enjoin the defendants from continuing any form of informal association of office supply dealers and from coercing other supply dealers through threats or boycotts.

*U. S.* v. *Phillips Petroleum Company* (U. S. D. C. S. D. Cal., Complaint, Dec. 9, 1960).

Attorney General William P. Rogers announced the filing in the United States District Court at Los Angeles of a civil antitrust complaint charging that the continuing acquisitions by Phillips Petroleum Company of the stock of Union Oil Company of California may be substantially to lessen competition or tend to create a monopoly, in violation of section 7 of the Clayton Act. Named as defendants in the complaint are the Phillips Petroleum Company, of Bartlesville, Oklahoma and Union Oil Company of California, Los Angeles, California.

It is alleged that since about April 29, 1959, Phillips has continuously purchased shares of the stock of Union in the name of bank nominees and brokerage firms. The complaint also alleges that the purchase by Phillips of Union's stock was pursuant to a resolution of the Board of Directors of Phillips adopted in April, 1959, approving an expansion of Phillips' refining and marketing facilities into the areas not then covered, and authorizing an expenditure not to exceed $50,000,000 for that purpose, including the purchase of capital stock of corporations offering going refining and/or marketing businesses; and pursuant to a resolution of the board of directors of Phillips, adopted in June, 1960, authorizing expenditure of an additional $5,000,000 for the purchase of stock of Union.

The complaint goes on to assert that during the period from April, 1959, to October, 1960, Phillips became the owner of a beneficial interest in not less than 1,262,700 shares, constituting approximately

14.8 per cent, of Union's common stock, for which Phillips paid more than $50,000,000. And during this period, Phillips' purchases of stock represented a majority of the Union stock traded on the national security exchanges. It is specifically alleged that Phillips' acquisition of the stock of Union was not "solely" for investment purposes.

Excluding Phillips, the largest Union stockholder of record is the Union Employees Incentive Plan, which as of June, 1960, held but 2.78% of Union's outstanding stock and that the natural person with the largest beneficial holding of Union's stock held only slightly over ½ of 1% of Union's outstanding stock. It is alleged that the average holding of all stockholders of record of Union, excluding Phillips, is 149 shares and that the acquisition has been accompanied by a substantial decline in the number of stockholders of record of Union. Under the principle of cumulative voting applicable by California law to Union, Phillips' present holdings of Union stock should be sufficient to elect 3 directors to Union's board.

The complaint alleges that both Phillips and Union are large integrated oil companies being engaged in the production of crude oil, natural gas, natural gasoline, refined petroleum products and petrochemicals; transportation of crude oil and products derived therefrom; and the marketing of crude oil and products made therefrom. As of December 31, 1959, Phillips and Union had total assets of $1,579,935,372 and $707,166,446, respectively.

The complaint alleges that the acquisition of control of Union by Phillips would increase Phillips' national rank among petroleum companies in total assets from eighth to seventh, in net production of crude oil from ninth to seventh, in crude oil refining west of the Mississippi from eighth to third, and in the sale of all refined petroleum products from ninth to sixth. Moreover, it is alleged that Phillips is the largest producer and marketer of natural gas liquids in the United States producing and marketing about 11 per cent of all natural gas liquids, which include natural gasoline and liquified petroleum gases, a percentage more than twice as large as the largest producer and marketer. It is alleged that Union is the fifteenth largest producer of natural gas liquids in the United States and that Union has recently become a joint owner in a large natural gas liquid extraction plant in Louisiana which will increase Union's production by about one-third. Phillips ranks first in the net production of natural gas in the United States producing nearly twice the quantity of the next largest company and that Union

ranks twentieth in such production and that within the past five years Union has doubled its natural gas production.

The complaint asserts that the effect of the continuing acquisitions by Phillips of Union stock may be to substantially lessen competition or tend to create a monopoly in violation of Section 7 in the following ways, among others: (1) actual and potential competition between Phillips and Union and generally in the production and sale of crude oil, natural gas, natural gasoline, liquified petroleum gas, refined petroleum products, and petro-chemicals may be substantially lessened; (2) that Phillips as a user or potential user of the above-mentioned products in its own production or marketing operations may divert to its own uses or otherwise channel or manipulate for its own purposes supplies which are now available to Phillips' competitors; (3) actual or potential foreclosure of sellers of crude oil, natural gas, natural gasoline, and liquified petroleum gas from a substantial segment of the market for those products through the partial elimination of a substantial actual or potential purchaser; (4) Union may be eliminated as a substantial actual and potential competitive factor in the petroleum industry; and (5) competition may be substantially lessened by the impairment of Union's ability to compete not only with Phillips but with others in the industry through the representation by Phillips upon Union's Board of Directors or the voting by Phillips of its Union stock or proxies.

*U. S.* v. *Maremont Automotive Products, Inc.* (U. S. D. C. N. D. Ill., Complaint, Dec. 9, 1960).

Attorney General William P. Rogers announced the filing of a civil antitrust complaint at Chicago, alleging that Maremont Automotive Products, Inc., of Chicago violated Section 7 of the Clayton Antitrust Act through acquisition of control over Saco-Lowell Shops, Boston.

Both firms manufacture auto exhaust systems for the replacement trade. According to the complaint, Maremont acquired Saco-Lowell to eliminate the competition of Saco-Lowell and Nu-Era Corporation, sole distributor of Saco-Lowell products.

It was alleged that Maremont acquired 52% of the outstanding stock of Saco-Lowell by purchases on the open market and from stockholders, and that the acquisition "may substantially lessen competition or tend to create a monopoly."

Maremont was described as the third largest supplier of auto exhaust systems in the replacement trade, accounting for some 13% of that market in 1959.

The complaint alleges that the industry is highly concentrated, Maremont and four other corporations supplying 97 percent of the market. It was further alleged that Maremont and the four other manufacturers quote virtually identical prices, have substantially uniform distribution policies and publish virtually identical suggested retail prices at all levels of distribution.

According to the complaint Nu-Era consistently quoted lower prices than Maremont and the others, and recently obtained some substantial accounts which formerly did business with Maremont. In 1959 Nu-Era allegedly accounted for 1.2% of the replacement market for auto exhaust systems and parts.

The suit charges Maremont acquired control of Saco-Lowell with the objectives of moving Saco-Lowell manufacturing facilities to the west coast, inducing Saco-Lowell to acquire Nu-Era, and cutting off the supply of mufflers to Nu-Era.

Proposed consent judgments filed with the complaint, binding on Saco-Lowell and Maremont, require Maremont to divest the Saco-Lowell manufacturing facilities within 18 months under terms to be approved by the court.

The judgment also perpetually forbids Maremont from acquiring Nu-Era or assets of Saco-Lowell, and prohibits Maremont for a limited time from acquiring any other manufacturer or, except with court approval, any distributor of mufflers.

A previous civil antitrust action filed in Maine, challenging Maremont's acquisition of control over Saco-Lowell, was dismissed last August 15 on grounds defendants could not be sued in that jurisdiction. At that time, the court indicated the suit should properly be filed in Illinois.

## Federal Trade Commission Activities

*F. T. C.* v. *Tyler Pipe & Foundry Co.* (FTC Dkt. #8123, Complaint, Oct. 10, 1960).

Tyler Pipe & Foundry Co., Tyler, Texas, a manufacturer of plumbing specialties and soil pipe, has been charged by the Federal Trade Commission with paying discriminatory promotional allowances to some customers.

For example, the FTC's complaint alleges, in 1957 and 1958 the concern periodically paid sums amounting to $1,000 to American Radiator and Standard Sanitary Corporation for promoting Tyler's products through television programs sponsored by American-Standard in the Dallas, Texas, trading area. These payments were not made available on proportionally equal terms to all other competing customers, as required by Section 2(d) of the Robinson-Patman Amendment to the Clayton Act, the complaint charges.

*F. T. C.* v. *Yakima Fruit & Cold Storage Co.* (FTC Dkt. #7718, Dismissal Order, Oct. 21, 1960).

The Federal Trade Commission announced its dismissal of charges that Yakima Fruit & Cold Storage Company, Yakima, Wash., discriminated among its customers in paying advertising allowances. The company is a packer and distributor of apples and other fresh fruit.

After review, the Commission vacated and set aside an initial decision by an FTC hearing examiner, who had held that the concern made advertising payments for the benefit of one customer but did not make them available on proportionally equal terms to all other competing customers as required by Section 2(d) of the Robinson-Patman Amendment to the Clayton Act. The recipient was J. Weingarten, Inc., of Houston, Texas, a grocery supermarket chain.

In its opinion by Commissioner Edward T. Tait, the Commission asserted that the evidence of record does not establish that Yakima's payments to Weingarten in connection with the latter's 1955 and 1958 anniversary sales were for advertising. The payments were $192.50 in the first instance and $100 in the second.

"The record shows no more than that in response to a solicitation to 'participate' in a customer's anniversary sale respondent made payments to the customer," Commissioner Tait pointed out. "Such a showing is inadequate to support a finding that respondent has violated Section 2(d) . . ."

"As we read the Act," he said, "there must be a showing that the payment was made as consideration for 'services or facilities' furnished by the customer in connection with the seller's product. Thus, payments made for other types of consideration or for which no tangible consideration was expected would not violate Section 2(d)."

"In this matter," Commissioner Tait added, "respondent contends that the payments to Weingarten were not made as compensation or

consideration for services or facilities rendered by this customer but were made as 'congratulatory good-will gestures' on the occasion of Weingarten's anniversaries. Counsel supporting the complaint contends that the payments were made to Weingarten for newspaper advertising of respondent's products."

Rejecting the arguments advanced by the FTC's counsel, the Commission ruled that "there is no direct evidence in the record that respondent, in making the payments to Weingarten, either expected or requested that its products be advertised or that Weingarten render any other service or facility with respect to them.

"As a matter of fact, the only evidence on this crucial point is the testimony of the respondent's general manager that the payments were made as a 'donation' to Weingarten's anniversary celebration and not in the expectation that respondent's products would be advertised."

*F. T. C.* v. *Gojer, Inc.* (FTC Dkt. #7851, Consent Order, Dec. 14, 1960).

Gojer, Inc., Akron, Ohio, a manufacturer of soap and cleaning products and dispensers, is prohibited from discriminating among competing customers in prices and services under the terms of a consent order approved by the Federal Trade Commission.

The Commission adopted an initial decision by Hearing Examiner Edward Creel based on an order agreed to by both the company and FTC's Bureau of Litigation. Denying Gojer's motion to stay the effective date of the initial decision until it can solve certain compliance problems, the FTC ruled that "granting of the request . . . would not be in the public interest."

In a complaint issued last March 30, the Commission alleged that the concern's classification of customers according to function and purchase volume results in competing purchasers being charged different prices, in violation of Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act.

For example, the complaint said, "Jobbers" receive 10% discount on purchases of 75 cases or more of Gojer's products, 5% on 35 to 74 cases, and no discount on 34 cases or less. Many of the favored and unfavored jobbers compete with each other in reselling these items, the complaint stated.

It added that jobbers who own a warehouse classified as a "Warehouse Group" get higher discounts than competitors in the "jobber" classification.

A further charge was that Gojer furnishes "missionary" personnel to some customers without making these services available to all other competing purchasers on proportionally equal terms as required by Section 2(e) of the law.

The "missionary" personnel are fully compensated by Gojer and accompany salesmen of favored customers in the field and give them practical, on-the-job training in selling its products, the complaint said.

*F. T. C.* v. *A. R. Fiorita Fruit Co.* (FTC Dkt. #8067, Consent Order, Dec. 15, 1960).

A. R. Fiorita Fruit Co., St. Louis, Mo., has consented to a Federal Trade Commission order prohibiting it from receiving illegal brokerage on its own purchases.

Acting on its complaint of last August 4, the Commission adopted an initial decision by Hearing Examiner Robert L. Piper based on an order agreed to by the FTC's Bureau of Litigation and the concern's partners, Anthony R., Joseph R., and Frank R. Fiorita.

The complaint charged that the firm violated Section 2(c) of the amended Clayton Act by accepting brokerage or a discount in lieu of brokerage on purchases for its own account for resale from Florida citrus fruit packers.

*F. T. C.* v. *General Foods Corp., et al.* (FTC Dkt. #8198, Complaint, Dec. 15, 1960).

The Federal Trade Commission announced charges that five concerns have unlawfully suppressed competition in the sale of Philippine desiccated and sweetened coconut through a monopolistic, price-fixing and maintenance conspiracy.

Cited in the FTC's complaint are: General Foods Corp., 250 North St., White Plains, N. Y., The Glidden Co., 900 Union Commerce Bldg., Cleveland, Ohio, and three subsidiaries of J. H. Vavasseur & Co., Ltd., London, England: Calvert, Vavasseur & Co., Inc., Red V Coconut Products Co., Inc., and Wood & Selick Coconut Co., Inc., all of 19 Rector St., New York City.

General Foods engages in the coconut business through its operating unit, Franklin Baker, and Glidden does so through its operating division, Durkee Famous Foods.

According to the complaint, the respondents' desiccated coconut is produced and processed in the Philippine Islands and then exported to the United States. This processing involves shelling and recovery of the meat from fresh coconuts, following which it is dehydrated and divided into various cuts for commercial use. Sweetened coconut is desiccated coconut which has been further processed in this country through softening, moistening and fluffing and the addition of sweetening agents and mold inhibitors. Both categories are used by bakeries, candy manufacturers, ice cream makers and others. In addition, sweetened coconut is retailed in smaller packages for household use.

The complaint alleges that in 1958 total desiccated coconut imports to the U. S. were about 99.7 million pounds, valued at $14.3 million, of which better than 98% came from the Philippines. General Foods and Calvert-Vavasseur account for about 75% of all Philippine desiccated coconut imported and sold commercially in this country.

General Foods, the complaint continues, is the nation's largest importer of such coconut as well as the largest processor of sweetened coconut. Calvert-Vavasseur, through Red V, imports Philippine desiccated and sells it and sweetened coconut domestically through Wood & Selick. Glidden purchases its total requirements of desiccated on a contract basis from Red V and supplies all sweetened coconut required by Calvert-Vavasseur, which has no facilities for producing this product.

The complaint charges that for a number of years the five companies, either directly or indirectly through subsidiaries, affiliates or operating divisions, have maintained a restraint-of-trade conspiracy under which they employ the following and other unfair methods of competition:

Fixing, stabilizing and maintaining uniformly identical base prices and price schedules for all types or cuts of both Philippine desiccated and sweetened coconut;

Applying established freight and storage charges to these identical base prices and price schedules in order to achieve uniform prices and delivery terms anywhere in the United States;

Maintaining a price leadership plan whereby General Foods leads in announcing changes in prices, selling conditions, etc., and the other four companies later adopt these changes;

Filing and exchanging information concerning past, present and future pricing factors and policies;

Dominating and controlling to a substantial extent the importation, sale and distribution of Philippine desiccated coconut in the U. S.;

Attempting to monopolize the domestic sweetened coconut industry and to eliminate competition from other domestic processors (who are dependent upon respondents for a large part of their Philippine desiccated coconut requirements):

(1) by refusing to sell Philippine desiccated to these competitors, selling only on a limited basis, or imposing unreasonable selling terms and conditions;

(2) by occasionally effectuating a price squeeze between Philippine desiccated and sweetened coconut. This is accomplished by increasing the fixed prices of the former without increasing proportionately the stabilized amounts for the latter. Through this price manipulation and control, the respondents have an effective method of controlling to a considerable extent the operations of competing domestic processors, the complaint says.

*F. T. C.* v. *Western Fruit Growers Sales Co.* (FTC Dkt. #8199, Complaint, Dec. 16, 1960).

The Federal Trade Commission issued a complaint against Western Fruit Growers Sales Co., Fullerton, Calif., on charges of paying illegal brokerage to some buyers of its citrus fruit pack.

According to the complaint, Western Fruit sells both directly and through brokers who are usually paid a commission of 10¢ per 1-3/5th bushel box.

The complaint alleges that the concern makes substantial sales to some brokers and direct buyers purchasing for their own account for resale and on many of these sales pays brokerage or grants a discount in lieu of brokerage, which is forbidden by Section 2(c) of the amended Clayton Act.

*F. T. C.* v. *Foremost Dairies, Inc.* (FTC Dkt. #6495, Mergers, Dec. 16, 1960).

An order by a Federal Trade Commission hearing examiner announced would require Foremost Dairies, Inc., Jacksonville, Fla., one

of the nation's largest processors and distributors of dairy products, to sell nine competitors it acquired in 1952 and 1953.

The nine acquisitions, Examiner Everett Haycraft ruled, may result in a substantial lessening of competition or tendency to create a monopoly in violation of the antimerger law, Section 7 of the Clayton Act.

On the other hand, he ruled that the Commission does not have power under Section 5 of the FTC Act to order Foremost to stop making any further acquisitions, as argued by FTC trial counsel. The complaint, issued Jan. 17, 1956, alleged Foremost's "constant and systematic elimination of actual and potential competitors" through numerous corporate and non-corporate acquisitions is an unfair method of competition forbidden by Section 5.

In addition, the examiner held that the other challenged corporate acquisitions by Foremost did not violate the antimerger law for these reasons: various acquired concerns were not engaged in interstate commerce; there is no evidence of adverse effect on competition resulting from other acquisitions; and some acquisitions were in areas where Foremost had never been in business and it did not gain a decisive competitive advantage in these areas since the acquired companies were not dominant there.

The examiner's order provides that Foremost "shall divest itself absolutely, in good faith" of the following nine corporations: Banner Dairies, Inc., Abilene, Texas, Phenix Dairy, Houston, Texas, Tennessee Dairies, Inc., Dallas, Texas, Southern Maid, Inc., Bristol, Va., The Welch Milk Co., Welch, West Va., Crescent Creamery Co., Sioux Falls, S. D., Moanalua Dairy, Ltd., Honolulu, Hawaii, Rico Ice Cream Co., Ltd., Honolulu, Hawaii, and Golden State Co., Ltd., San Francisco, Calif.

As a result of the Banner, Phenix and Tennessee acquisitions, Examiner Haycraft stated, competition between Foremost and each of the three concerns "was completely eliminated" in their respective market trading areas. "Foremost became a major factor in many of the chain stores and supermarkets in those urban market areas, and the consuming public, buying through them, was deprived of the benefit of the pre-existing competition, except in Dallas where Foremost had not previously sold fluid milk. There Foremost acquired substantial chain store supermarket fluid milk business to complement its ice cream business. In each instance, respondent's share of the market in the sale of fluid milk and ice cream was increased, and,

where it had not previously been a major factor in the market, it became such as a result of the acquisition and it had a competitive advantage over many of its competitors."

The Golden State acquisition, the examiner continued, not only eliminated competition between this concern and Foremost in certain California metropolitan areas but also tended to give the latter "a decided advantage over all competitors in the State of California, not only in the production and sale of fluid milk, but also of ice cream. Furthermore, in the California area, there was a definite tendency toward undue concentration in the respondent and three other nationwide dairy companies: Borden, Carnation and Beatrice. Respondent became the dominant factor in the fluid milk market in all four of the metropolitan areas where there had been competition between it and Golden State prior to the acquisition, and it also became the largest distributor of fluid milk and frozen dairy products, including ice cream, throughout the entire State.

This acquisition, as well as the three in Texas, he said, are the culmination of a series of smaller acquisitions "so that it can be concluded that the cumulative effect of these acquisitions has a definite tendency to substantially lessen competition . . . and to create an oligopoly by the respondent and other large processors . . . "

The examiner added that the other five acquisitions were unlawful because they had these adverse effects: Moanalua Dairy and Rico Ice Cream—Gave Foremost control of "30% of the market of fluid milk" in the Honolulu area. Crescent Creamery—Eliminated "all competition which had theretofore existed between "Foremost and Crescent, and enabled the former to achieve "a dominant competitive position" in the Sioux Falls, S. D., metropolitan area. Southern Maid and Welch Milk—"not only was there a substantial lessening of competition between Foremost and the acquired companies in the sale of fluid milk and ice cream, but respondent became a major factor in the fluid milk market in the Tri-City area of Bristol, Virginia; and Johnson City and Kingsport, Tennessee."

Concerning Foremost's acquisitions into new areas (market extensions), the examiner commented:

> " . . . it is not believed that the entry by Foremost into a new area of effective competition is per se evidence of either a substantial lessening of competition or a tendency to monopoly, even

> though, as indicated, Foremost obtained, at the time of the entry, a substantial sales volume and the advantage of an established business. Nor does the fact that Foremost became a substantial, although not a dominant, factor in the new area of effective competition as a result of the acquisition give it a decisive competitive advantage, unless the proof shows that respondent became such a powerful factor that it was able, and did, utilize monopolistic practices to advance its position in the new area of competition. Not only were there smaller units in each area of effective competition in which the acquisition occurred, but it also appears that there were a number of competitors larger than, or equal in size to, the respective acquired corporations. Also, even if Foremost was a stronger competitive unit than the unit replaced, this in and of itself is not sufficient to make the transaction illegal in the absence of evidence of the use of unfair practices to expand its business."

Turning to the Section 5 allegation of the complaint, the examiner said counsel supporting the complaint indicated there were remedies available under this section which can be used to prevent acquisitions of competitors, "for example, 'The one possible remedy would be to cease and desist from making any further acquisitions, corporate or non-corporate, in commerce or not in commerce.' "

This contention, ruled the examiner:

> "Must be based on the assumption that the Commission has more power under Section 5 of the Federal Trade Commission Act than it has under Section 7 of the Clayton Act, an assumption which is not supported by either court decisions or by logic. If the Commission had such power, under Section 5, why was it necessary for Congress to enact Section 7 of the Clayton Act in 1914, or amend it in 1950? Congress, in its wisdom, has amended the Clayton Act to make sure that the Commission does not interfere with the business transactions of small units in any industry, by requiring that the Act be restricted in its application to corporations engaged in [interstate] commerce, and further, that the acquisition is unlawful only where the effect may be: 'substantially to lessen competition or tend to create a monopoly' in any line of commerce in any section of the country. This last requirement is admittedly intended to make the law applicable only

to transactions having a substantial effect on competition in any given market, and not to apply to inconsequential acquisitions; that is, acquisitions which have an inconsequential effect on competition.

"Furthermore, any cease and desist order entered by the Commission under Section 5 would necessarily be restricted to unfair practices or methods which it had found respondent to be engaged in at some time in the recent past. As indicated in the National Lead case, it has to be assumed by the Commission that the respondent is going to continue the activities of acquiring corporations where the acquisitions would be in violation of law. What good would it do to require a respondent corporation to cease and desist acquiring corporations, unless it could be shown that the effect of such acquisitions would violate Section 7 of the Clayton Act which Congress intended to apply to such transactions?"

Commenting on other arguments advanced by FTC trial counsel, Examiner Haycraft said "there is nothing in any of the decisions, or quoted excerpts from reports of House Committees or Senate Committees, which is in support of the contention that the acquisition of corporations in geographical areas where respondent has never done business is a violation of the statute [Sec. 7 of the Clayton Act] because of the cumulative effect upon potential competition."

"Furthermore," he concluded, "there is no language in either decision or Committee report to support their contention that it is not necessary to determine the point at which an acquisition or accumulation becomes unlawful; that it became unlawful at its very beginning, or that where a cumulation of acquisitions produces the unlawful effect, the cumulation is unseverable, or that once unlawful effect is achieved, the whole cumulative series becomes tainted with an illegality which cannot be cured by partial divestiture. The adoption of such a theory would put American business in such a strait jacket that it would be impossible for a corporation, in any industry, to expand by acquiring concerns in other geographical areas. It is our opinion that so long as Foremost, in its program of expansion, went into geographical areas in which it had not therefore been engaged in the dairy business, and purchased existing processors of dairy products that were not in a dominant position in the revelant market area in

point of production and sales or share of market at the time of their acquisition, thereby gaining a decisive competitive advantage immediately in that area, such acquisitions were not in violation of Section 7 of the Clayton Act. In the present case, where Foremost made its mistake was in making further acquisitions in those areas where it had already established itself and where, as a result of such second or third acquisition, it was placed by this cumulative process in a position of leadership and thus gained a decisive advantage over its competitors. It is concluded that these latter acquisitions are the only acquisitions of this type in this particular industry that are in violation of Section 7 of the Clayton Act and that is because of the elimination of substantial competition that existed between the acquired and the acquiring corporations, and the dangerous tendency thereby to create a monopoly or oligopoly in the relevant market area. The illegality of the last acquisition would not necessarily make the first one illegal. It is the cumulative effect upon competition that determines the legality or illegality of the second or later acquisition."

*F. T. C.* v. *Scott Paper Co.* (FTC Dkt. #6559, Order, Dec. 23, 1960).

The Federal Trade Commission ruled that the acquisition of three paper industry concerns by Scott Paper Company of Chester, Pa., violated the antimerger law, Section 7 of the Clayton Act. Scott is the nation's leading seller of sanitary paper products which, for the purpose of this proceeding include toilet and facial tissue, paper napkins and towels, and household waxed paper.

In its opinion by Commissioner William C. Kern, the FTC found the acquisitions may substantially lessen competition or tend to create a monopoly, and ordered Scott to sell: (1) Soundview Pulp Co., Everett, Wash., a bleached sulphite pulp producer which was merged into Scott on November 9, 1951, by the issuance of $60 million in stock; (2) Detroit Sulphite Pulp and Paper Co., Detroit, Mich., which manufactured base paper stock, and which Scott obtained on September 2, 1954, for stock valued at $11 million; (3) Hollingsworth & Whitney Co., Boston, Mass., a producer of varied paper products, none competitive with Scott's, which was acquired on October 27, 1954, in exchange for $38 million in stock.

Issuing its own findings as to the facts, the Commission vacated and set aside an initial decision by Hearing Examiner William L. Pack,

which would have dismissed the FTC's complaint of June 1, 1956, for failure of proof.

"The crucial error in the initial decision is the finding that the record fails to establish any causal relationship between the acquisitions and the respondent's enhanced market position," Commissioner Kern's opinion asserted. It added:

> "The acquired properties became stepping stones to expanded production facilities sooner than would have been the case with entirely new construction. The additions and improvements at the acquired properties accounted in 1955 for approximately 23% of Scott's total shipments as shown in the [FTC's] survey [of shipments of sanitary paper products for the years 1950 and 1955]. Without this increased production, respondent's share of the total market, instead of being 32.72% in 1955, might well have declined to 24.27%, whereas it had been 26.76% in 1950. The record indicates that the mergers contemplated extensive expansions and adaptations to satisfy the respondent's current and future production and other needs. It also indicates that an important consideration was respondent's belief that those needs would be more fully satisfied by means of the acquired properties and their personnel than through entirely new construction. Moreover, by respondent's own statements, expansion of this newly-acquired productive capacity was much more economical than the comparable cost of constructing entirely new plants. Thus the finished products manufactured on new machines at the newly constructed plants on the acquired properties are to be regarded as increments of the acquisitions, just as were those products turned out by the rebuilt machinery. Each helped Scott to meet the pent-up demand for its products.
>
> "The direct causal relationship between the acquired properties and the respondent's increasingly dominant market position also is evident from the fact that the additional production from those facilities assisted the respondent in greatly increasing its number of brands and otherwise diversifying its products."

The Commission also held that the examiner erred in ruling that the FTC's sanitary paper shipments survey for the years 1950 and 1955 was of no material value in resolving the issues presented in this case.

This survey, the FTC ruled, clearly provides competent and accurate evidence. "The year 1951, in which the first acquisition occurred, was a landmark year in Scott's industrial history. In 1950, the respondent produced less than half its pulp. Demand for Scott's products had outstripped its productive capacity and this condition persisted in varying degrees until facilities at certain of the acquired properties began to contribute substantial quantities of finished products. In 1951, the respondent gained timber resources and greatly increased its supplies of pulp, definitely assuring itself of expanded production near growing and strategic markets for its trade-marked finished products in the near future. By 1955, the improvements and facilities at the acquired properties were supplying substantial amounts of finished products and paper stock as well as more pulp. 1950 and 1955 accordingly were proper bench mark years and the data showing market shares in the revelant markets in 1950 before the resources of the acquired corporations passed to respondent's control are clearly relevant."

Furthermore, the Commission said, "it is appropriate that the effects of the acquisitions be measured in the entire United States, that is, in the national market. Not only are the industry's products sold and used nationwide, but Scott and certain of its leading competitors sell throughout the United States . . . The record clearly establishes the existence of an effective nationwide area of competition and the hearing examiner erred in failing so to find."

After overruling other findings by the examiner, the Commission concluded:

> "In view of the respondent's dominant position in the line of commerce for sanitary paper products and certain of its component relevant markets before the acquisitions, any acquisition which tended to assist its distribution of trademarked products could reasonably have repercussions in those markets. The present and reasonably probable future impacts of the challenged acquisitions are of much greater magnitude, however. In consequence of the acquisitions, the respondent (1) has decisively strengthened its ability to compete in that it gained needed materials and production facilities which also afforded economies and strategic marketing advantages that could be reflected in prices or profits, or in advertising and product diversification for further enhancing

its position in the relevant markets, and (2) has substantially increased its share in those markets over their prior high levels.

"Such expanded market shares did not come automatically as legacies of horizontal acquisitions but were instead achieved in the market place with telling contributions out of the acquired properties. Each of the acquisitions has concomitantly increased and will continue to increase the respondent's capacity to exert the power inherent in its dominant market position. As a corollary effect, the acquisitions have tended to widen the great disparities in resources and ability to compete which previously existed between the respondent and many of its rivals."

Therefore, the Commission added, "it follows that the effect of the acquisitions may be substantially to lessen competition and to tend to create a monopoly in the relevant lines of commerce. . . . The appeal of counsel supporting the complaint from the hearing examiner's dismissal of the charges under Section 7 of the Clayton Act, as amended, is accordingly granted."

At the same time, however, the Commission dismissed charges in the complaint that Scott's constant acquisition of companies and conversion of them to production of its products is an unfair method of competition forbidden by Section 5 of the FTC Act. The Commission ruled these allegations "lack adequate support in the record."

*F. T. C.* v. *The Pillsbury Co.* (FTC Dkt. #6000, Order, Dec. 23, 1960).

The Pillsbury Company, Minneapolis, Minn., the nation's second largest flour milling company, has been ordered by the Federal Trade Commission to sell two major competitors it acquired—Ballard & Ballard Co., Louisville, Ky., purchased on June 12, 1951; and Duff's Baking Mix Division of American Home Foods, Inc., located at Hamilton, Ohio, purchased in March of 1952.

Both acquisitions, the FTC ruled in its opinion by Chairman Earl W. Kintner, are unlawful under Section 7 of the Clayton Act (the antimerger law) because they may result in a substantial lessening of competition or tendency to create a monopoly.

The Commission found that the Ballard acquisition had the foregoing adverse effects on the family flour, flour-base home mix, and wheat flour milling products industries in the Southeastern part of the

United States, and the Duff acquisition had them on the home mix market throughout the country.

In taking this action, the Commission adopted an initial decision by Hearing Examiner Everett F. Haycraft, after making certain changes in the scope and form of his order.

The Commission's opinion pointed out that Ballard was an old established, highly diversified firm doing business throughout the Southeast. It competed with Pillsbury in a broad line of milling products and had an aggressive management. Ballard had been in the field of prepared dough products since 1931 with its "Oven-Ready Biscuits." Its "Obelisk" family flour was a premium product and one of the important brands in the area, outselling even "Pillsbury's Best."

"Ballard," the opinion continued, "was one of the few regional companies in the Southeast in a position to compete effectively with such large nation-wide distributors as Pillsbury and General Mills, especially in the urban centers where premium brands dominated sales. The few other regional companies of significant size having comparable premium flours either did not sell widely in the market or they emphasized sales in rural areas and thus were not generally as competitive in the cities as Ballard. . . .

> "It is clear, therefore, that the acquisition of Ballard removed an important and effective competitor from the Southeastern market."

The FTC further stressed that this acquisition materially and significantly added to Pillsbury's competitive strength. "Bureau of Census figures show that it had in excess of 9% of flour production in the United States in the fiscal year ending May 31, 1951. Combining its strength in the family flour sales in the Southeast with that of Ballard gave Pillsbury a position in the whole market exceeding even that of General Mills and put it in first place in this market. The Ballard acquisition added to or supplemented in many ways the competitive stature of Pillsbury in the Southeast, greatly increasing its importance in that market. The mill facilities of Ballard enabled Pillsbury to meet peculiar requirements for family flour products in the Southeast with greater ease. This acquisition gave Pillsbury a broader sales base and thus justified more intensive sales promotions in the area. It permitted Pillsbury to expand its family flour business

in a territory in which it had not been so strong as in other sections of the country.

> "Respondent, therefore, by the Ballard merger, has substantially increased its position in the Southeastern area and has materially furthered concentration in that market. In 1956, Pillsbury and General Mills together had more than 20% of the sales of family flour in the Southeast."

The number of flour and meal milling establishments in the U. S. declined from 11,601 in 1909 to 803 in 1954. There has been a definite concentration in the larger concerns, resulting in significant part from mergers. Since 1940 only one new flour mill has been built in the Southeast but there have been many withdrawals, the Commission stated.

In addition, it said, the Ballard acquisition removed one of the foremost competitors in the wheat flour milling products industry in the Southeast. "The evidence in this record showing the trend toward concentration in the flour milling field, the great decrease in the number of wheat flour mills over the years, the increase in the control of milling capacity by a few large firms, and the enhanced position which Pillsbury obtained in the Southeast as a result of the Ballard acquisition, relates as much to the general flour milling field as it does to the family flour line of commerce."

Discussing the home-mix market, the Commission noted that Duff was one of the oldest brands, had good consumer acceptance throughout the country and was a highly effective competitor carrying a full line.

Through the Duff acquisition, the opinion stated, Pillsbury achieved "a wider market, access to formulae and procedures which Duff possessed and, most important, modern production facilities. Utilizing these new facilities, Pillsbury was able to immediately expand its operations in the flour-base home mixes markets.

> "The result was increased concentration in the mix industry. Pillsbury was one of the two top companies which together in 1954 controlled about 66% of the cake mix business in the United States and 64% of that business in the Southeast. The acquisition of Duff further accentuated this accumulation of competitive strength in the hands of the largest companies in the industry.

"Pillsbury competed in the sale of flour-base home mixes with both Ballard and Duff in the Southeast. Duff was an effective competitor in this area just as it was an effective competitor nationally. The Southeast was an important market for Duff. As for Ballard, its sales of 80,000 hundredweights of mixes in the 1949-50 period prior to its acquisition were more than one-half of Pillsbury's sales of 151,000 hundredweights at that time in the Southeast.

"The acquisition of Ballard and Duff had the same general effects on the mix market in the Southeast as the acquisition of Duff had on the mix market in the United States; if anything the effects were more serious. Respondent eliminated two effective and substantial competitors in this area. Its position as one of the major competitors in the Southeast was strengthened and improved. Concentration in this market was substantially increased, with the probable result of a serious detrimental effect on competition."

The Commission rejected Pillsbury's contentions that Ballard was a "failing firm" when acquired and that various rulings of the examiner amounted to a denial of due process.

*F. T. C.* v. *American Ball Bearing Corp.* (FTC Dkt. #7565, Dec. 27, 1960).

American Ball Bearing Corp., Brooklyn, N. Y., the manufacturer of "ABC" automotive bearings, has been ordered by the Federal Trade Commission to stop charging different prices to purchasers who compete with each other in reselling its products.

Also subject to the order is the concern's general manager, Leo L. Lowy, who formerly traded as American Ball Bearing Company.

The Commission adopted Hearing Examiner Edward Creel's initial decision of last October 26 holding that respondents illegally have given some customers greater discounts than competing purchasers. These price discriminations, the FTC agreed, may substantially injure competition in violation of Section 2(a) of the Robinson-Patman Amendment to the Clayton Act.

The examiner had found that American classifies purchasers into three categories—jobbers, distributors and warehouse distributors—and charges them different prices. Jobbers pay about 10% more than distributors and about 20% more than warehouse distributors, while

distributors are charged approximately 10% more than warehouse distributors.

"Many purchasers, classified by respondents as warehouse distributors and distributors, failed to perform the functions necessary to qualify under respondents' definitions for the respective discounts granted purchasers in those classifications," the examiner stated.

For example, he said, Southern California Jobbers, Inc. (SJC) of Los Angeles, Calif., and Southwestern Warehouse Distributors, Inc. (SWD) of Dallas, Texas, were classified as warehouse distributors when they are merely buying offices for their jobber members. SCJ has 63 members and SWD more than 40.

"Individual jobbers," the examiner ruled, "in competition with distributors and members of buying groups classified as warehouse distributors, are placed at a competitive disadvantage by having to pay 10% to 20% more for ABC bearings than their competitors, thereby resulting in injury to competition."

*F. T. C.* v. *Crum, et al.* (FTC Dkt. ##8204 & 8206-8, Complaints, Dec. 29, 1960).

The Federal Trade Commission has charged the following food brokers with receiving illegal brokerage on purchases for their own account for resale: Robert Warren Crum, doing business as Bob Crum, Produce Station, Tampa, Fla. (8204); Florida Citrus Distributors, Inc., Orlando, Fla. (8206); Russell-Ward Co., Seattle, Wash. (8207); and George W. Reaves, Jr., doing business under his own name, Dallas, Tex. (8208).

According to the FTC's complaints, each respondent has made substantial purchases of citrus fruit for its own account from various packers or suppliers and has accepted brokerage or a discount in lieu of brokerage, which is forbidden under Section 2(c) of the amended Clayton Act.

A further charge against Mr. Crum is that frequently he has unlawfully received brokerage or discounts from sellers on purchases for a buyer where he is acting as the buyer's agent.

*F. T. C.* v. *Pure Gold, Inc. and Pipping Packing Co., Inc.* (FTC Dkt. ##8209-10, Complaints, Dec. 29, 1960).

Two citrus fruit packers have been charged by the Federal Trade Commission with making illegal brokerage payments to favored customers.

Cited in the FTC's separate complaints are: Pure Gold, Inc., Redlands, Calif. (8209); and Pipping Packing Co., Inc., Winter Haven, Fla. (8210).

Both companies, the complaints allege, sell their citrus fruit both directly and through brokers who usually are paid a commission of 10¢ per 1-3/5 bushel box.

The complaints charge that the two packers sell in substantial volume to some brokers and direct buyers purchasing for their own account for resale, and on many of these sales pay brokerage or grant a discount in lieu of brokerage, in violation of Section 2(c) of the amended Clayton Act.

## BOOK REVIEWS

*Mergers and the Clayton Act,* by David Dale Martin (Berkeley and Los Angeles: University of California Press, 1959. Pp. 351. $6.00).

The greater part of this volume reviews the legislative history and subsequent enforcement of the original section 7 of the Clayton Act of 1914. Less than a third of the study is devoted to a discussion of the background of the 1950 amendment and some early proceedings under it. Since the book went to press just as the *Bethlehem-Youngstown* case was decided, this landmark interpretation of the new law is not analyzed.

Professor Martin of Indiana University finds it is impossible to ascertain what Congress explicitly intended by section 7's criteria of illegality. He concludes, however, that the omission of asset acquisitions was deliberate: the law was intended to cope with the evils of monopolistic holding companies. Acquisitions (as distinguished from consolidations) represented one-eighth of aggregate merger capitalizations and one-sixth of the total merger disappearances during the crucial decade ending in 1904 and rose subsequently, according to Ralph Nelson's careful statistical findings.[1] His sources did not enable him to estimate the percentage of acquisitions which took the

[1] *Merger Movements in American Industry 1895-1956* (Princeton, 1959), pp. 60, 64. A preliminary mimeographed version was available in 1958, but Martin does not cite it.

forms of stock and asset purchases respectively. We therefore do not know whether as Martin states, asset acquisitions were "a common occurrence" around 1900 (p. 50), but can agree with his position that such acquisitions "were not unknown" at the time (p. 237). Conceivably, as Myron Watkins suggested in 1929, the explanation of the omission is that Congress realized asset acquisitions were more difficult to arrange than stock.[8] Martin's conclusion that Congress intended to forbid holding companies which would probably lessen competition does not rule out the possibility that had acquisitions been better known to the general public and more widely used, they too would have been included in the section's scope.

After reading that both the F. T. C. and the Justice Department dismissed charges against Continental Baking Corporation we can be pleased that such mix-ups have not occurred in recent years, thanks to the coordination achieved by the two agencies in the merger sphere. Before 1950, enforcement was left almost entirely to the F. T. C., whose records in the merger area as unfolded in this narrative, can hardly be called distinguished. Martin makes the interesting suggestion in connection with the 1927 *Kodak* case that the Commission neglected to try to persuade the courts that an asset acquisition could be an unfair method of competition, within the meaning of section 5 of the F. T. C. Act. A review of the 121 acquisitions from 1932 to 1938, dismissed after preliminary investigation, convinced the author (contrary to what the F. T. C. told the T. N. E. C.) that the Supreme Court's Sherman Act standard of illegality and not the "assets loophole" was the major enforcement problem. The Commission, however, emphasized the "loophole" in urging that the 1914 law be amended. The F. T. C. cannot claim credit for the important change in the standard of legality made by the 1950 law.

Martin thinks the new law might be used to prevent mergers between small firms in markets dominated by large ones. The House Report on the bill specifically ruled out such prosecutions, and the record to date offers no ground for such fears.[9]

The *International Shoe* decision is said to give a failing firm the right "to make the most profitable disposition of its property" (p. 133).

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[8] National Industrial Conference Board, *Mergers and the Law* (New York, 1929), p. 113.

[9] 81st Cong., 1st Sess., House Report 1191 (1949), pp. 6-7.

The Supreme Court, however, considered International "the only available purchaser." [4]

This work is based in the main on congressional documents and court and F. T. C. decisions. Scant reference is made to the vast legal-economic literature which has grown up around the 1950 amendment.[5] If this was ignored in the interest of brevity, certain areas nevertheless deserved more extended treatment, particularly the issue of quantitative vs. qualitative substantiality. The concluding discussion of economically meaningful criteria for mergers would have been enriched by a critique of the Brownell statement.[6]

Meticulous in noting errors when he quotes the original sources, Martin should himself have specified "the demand for the product *of a firm*" (p. 133, 4th line from the bottom; missing words in italics). The printer omitted an essential line (p. 35, line 12): insert between "competition" and "whether," "but that it confers a potential power to lessen competition. . . ."

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*Le Pouvoir de Monopole: essai sur les structures industrielles du capitalisme contemporain*, by Jacques Houssiaux (Recherches Economiques. Paris: Sirey, 1958. Pp. iv, 416. 3800 Frs.).

More through pressure of events than by choice, continental Europeans are coming to show an increasing awareness of the problems of industrial organization and policy. Such forces as structural changes caused by rapidly growing economies and heightened stress on productivity required to compete in world markets (and now increasingly at home as well) are contributing to this trend and so, no doubt, is the influence of Anglo-Saxon, especially American, writers. Now J. Houssiaux, Professor of Law and Economics at the University of Nancy, has compiled an ambitious volume in which he acquaints the French speaking reader with recent developments in a wide sector of the field and applies them to the operation of the French economy.

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[4] 280 U. S. 291, 301, 302 (1930).

[5] F. T. C. Library, *Selected References Relating to Clayton Act, Section 7 and the Current Merger Problem* (Washington, 1958).

[6] New York Times, October 1, 1954.

The work is divided into two "books." Many European readers will probably find the first, which discusses various measures of monopoly power from a conceptual and empirical viewpoint, even more valuable than the second, their application to France. For they will be introduced, for the first time, to a comprehensive survey of the literature on the measurement of monopoly, both conceptually (by means of cost-price ratios, cost differences, demand elasticities, product differentiation, entry limitations, etc.) and empirically (through concentration ratios and other indices of absolute and relative size). American students will of course be familiar with this material from the writings of Lerner, Triffin, Fellner, Chamberlin, Bain, Adelman, Nutter, Rosenbluth and others, but the extensive bibliography included may prove useful even to them.

The author is fully familiar with the recent American literature, yet he finds it necessary to draw numerous examples from studies published before the second World War (*e.g.*, National Resources Committee and T. N. E. C. Hearings). The unsophisticated reader may thus be left with quite an antiquated, and therefore biased, view of the structure of American industry. One realizes more fully how great the need is for a new, comprehensive examination of changes in this structure—preferably without the political overtones of the investigations of the 1930's. At the same time one is impressed with how far we are still ahead of Europe in this respect, not only in matters of available data but, even more strikingly, in concepts and policies. American readers may wonder, for example, about the alleged novelty of Houssiaux' concept of "monopoly power," heavily emphasized in Professor Robert Goetz-Girey's preface. This turns out to be nothing but the need to supplement measurements of market concentration by detailed studies of economic behavior before industries can be categorized as monopolistic or competitive (or as belonging to any of various possible subdivisions thereof).

Of far greater interest to American economists will be the extensive empirical work on the structure of the French economy which constitutes Book II. It includes both a cross-sectional analysis (based on data for the early 1950's) and comparisons with the beginning of the century. We learn, among other things, that the 81 largest firms (based on total sales) account for 20% of all transactions in the French economy, and that the concentration ratios in industry groups range from 18% for metal products to 85% for glass. On the whole,

concentration in the French economy is comparatively modest but, as the author emphasizes, it is overshadowed by institutional restrictions on competition, both structural (*e.g.*, interlocking directorates) and behavioral (*e.g.*, price fixing and market sharing agreements). Nor has the government contributed much toward fostering a climate in which competition can thrive. In an annex on control of industrial agreements the author points out the inadequate enforcement of such antitrust legislation as exists, especially of the decree governing price fixing agreements. There is of course nothing like our blanket *per se* prohibition against such agreements, in France or any other European country; individual agreements are evaluated by weighing their advantages and drawbacks. In addition, however, existing regulations do not even require registration of such agreements; neither the membership of the commission charged with enforcing the law nor its decisions are ever published; and there were fewer than a dozen cases acted upon in the five-year period surveyed. It is to be hoped that these and other deficiencies will be remedied under the rules of the Common Market, which provide for much stronger regulation of monopolistic practices.

The book received the prize of the Association Française de Science Economique, as well as a grant from the Ministry of National Education. There are numerous misprints of American titles.

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*August 1960*

## Notes

In his year-end (1960) report to former Attorney General William P. Rogers, Assistant Attorney General Robert A. Bicks, former head of the Justice Department's Antitrust Division, said that "1960 saw: (1) successful prosecution of the most significant bid-rigging or price-fixing cases in the history of the Sherman Act; (2) a new postwar high in the number of antitrust cases initiated (more than 90 in the calendar year); (3) continued heavy emphasis upon Clayton Act anti-merger provisions; and (4) major advances in the Antitrust Division's program of cooperation with State Attorneys General to further Federal and State antitrust."

## I.

"Highlighting 1960," Mr. Bicks stated, "was the successful prosecution of the largest group of related criminal and civil antitrust cases ever brought under the Sherman Act. A total of 20 indictments attacked widespread price-fixing and bid-rigging conspiracies in the heavy electrical equipment industry. These indictments involved yearly sales in the neighborhood of $1.8 billion. The proceedings culminated in the entry in the Federal District Court in Philadelphia of pleas of guilty and *nolo contendere* by virtually all defendants. With 29 corporations and 46 individuals indicted by Federal grand juries, only one company official remains to face trial. The Government's successful opposition to pleas of *nolo contendere* aided entry of guilty pleas from defendants in seven of the most serious cases, where the value of the products covered totalled over $1.3 billion annually."

"The first group of indictments was returned during February," said Mr. Bicks, "and the remainder throughout the year. Thus, with the entry of these pleas in December, the Department has, within a period of 10 months, been able to resolve promptly significant issues of criminal responsibility, without the expense and years of delay in protracted litigation. This swift resolution of culpability should have a deterrent value unmatched in the history of criminal antitrust enforcement."

After proffer of pleas in these criminal cases, the Court, Chief Judge Cullen Ganey, was moved to remark:

> "I, too, want to compliment the Government. I think they have done a splendid job. It is a record of achievement which, in my twenty years on the bench, I have not seen paralleled. . . ."
>
> "The companion civil cases, seeking to restore competitive conditions to this vital industry, are pending. With issues of liability satisfactorily resolved in the criminal proceedings, early solutions to the problems in formulating suitable decrees will insure active price competition in this industry."

## II.

Mr. Bicks' report detailed the intensive enforcement record of the Antitrust Division during 1960. Referring to the more than 90 cases initiated during the calendar year, he stated: "This total is surpassed only once in the entire 70 years of the antitrust laws, and represents

a continuation in our efforts to strengthen enforcement activity. In more recent perspective, this figure indicates an increase of 80% over the average number of new cases filed in the past 20 years."

"Not only was a record number of cases filed, but more than one-third of the 90 odd cases filed this year have already been terminated successfully. Thus we strive to keep our dockets current."

## III.

His report further underscored the importance and economic significance of the cases filed during the year. "Vigorous enforcement of the Clayton Act's proscriptions against corporate mergers and acquisitions injurious to competition was expressed in the new high of 12 such cases instituted this year," declared Mr. Bicks. "Coupled with the 10 new proceedings begun last year, the two-year total of 22 cases accounts for nearly 60% of the Clayton Act Section 7 activity of the Antitrust Division since the statute was revitalized by Congress in 1950."

"As has often been asserted, Section 7's prophylactic effect makes it a prime weapon of antitrust enforcement. Challenging corporate concentration via merger or acquisition before monopolistic stature is reached, Section 7 enforcement is a vital instrument in preserving competitive vigor in these important times. Grounded upon an overall program of intensive antitrust enforcement, the effective application of Section 7 can be a major factor in maintaining the competitive structure of those segments of our economy with significant growth potential."

The following cases are illustrative of Section 7 activity during 1960:

(1) A major case filed early this year challenges Aluminum Company of America's acquisition of Rome Cable Company, a leading independent manufacturer of wire and cable products. The complaint charges that the acquisition by Alcoa, largest producer of aluminum in the United States, may substantially lessen competition or tend to create a monopoly.

(2) Another significant case, filed only last month, seeks to prevent the Phillips Petroleum Company from acquiring control of Union Oil Company of California. Both Phillips and Union are major integrated oil companies, and should Phillips obtain control over Union, the degree of economic concentration in the petroleum industry would be substantially enhanced, to the detriment of competition.

(3) Prompt Section 7 enforcement was successful in forcing Gamble-Skogmo, Inc. to divest itself of a controlling stock interest in Western Auto Supply Company. Charging injury to competition as a result of Gamble-Skogmo's ownership of stock in a competing chain of "hard goods" stores, the complaint was resolved within four months of filing by a consent decree requiring divestiture of the unlawfully held stock.

Other merger cases are aimed at preventing unlawful concentration in such basic industries as steel, chemicals, paper, automotive parts, grocery retailing, drug retailing, and motor vehicle leasing. Moreover, the pace of investigation into other mergers and acquisitions, proceeding on a commensurately intensified basis, indicates a strong likelihood for similar vigorous Section 7 activity in the coming year.

"In this light Section 7 enforcement ranks among our most important activities, absorbing a good portion of the Antitrust Division's resources," continued Mr. Bicks. "First, Section 7 enables presentation of essentially structural issues to courts in more manageable bites. Questions focus on one transaction—the acquisition—and its probable market consequences. Second, perhaps for such reasons, Section 7 cases can be tried promptly. In *Youngstown-Bethlehem,* for example, trial was completed some 13 months or so after issues were joined. Finally, perhaps avoidable under Section 7 are difficult problems of unscrambling assets long since joined together. Where mergers are halted prior to consummation relief problems diminish."

Comprehensive enforcement of the Clayton Act anti-merger provisions has not, however, been at the expense of Sherman Act enforcement. In addition to the electrical cases, unlawful restraints involving drugs, office furniture and supplies, steel products, building materials, and automotive parts, among other products, have been subjected to judicial scrutiny under Sections 1 and 2 of the Sherman Act.

Conversely, in Sherman Act criminal cases closed during the year, total fines assessed exceeded $1,000,000 for the second consecutive year.

## IV.

Finally, important steps were taken by the Antitrust Division to implement cooperation between Federal and State governments in the antitrust field. Conferences with State Attorneys General, at the annual Conference of State Attorneys General, and at intervals throughout the year on an individual basis, were exceedingly fruitful in stimulating enforcement of state antitrust laws.

Concurrently, the Division was able, in three cases where the illegal conduct was directed particularly at state and local governmental agencies, to achieve effective judicial relief while preserving the rights of cities and states to recover damages incurred as a result of the unlawful activities. In insisting upon provisions recognizing the interests of state and local governments, the Division obtained consent decrees restoring competitive conditions and also aiding injured states or cities to secure recompense for damages done them. Regarding this procedure, State Attorney General Stanley Mosk has declared: "I know of nothing that would be more helpful to me in protecting and furthering the legal interests of the State of California and its public agencies."

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